

SCRUTINY OF BURNHAM ON CROUCH APPEALS/COSTS DECISION AND PLANNING DECISION MAKING

Background and context

1. The Committee has agreed to add the issues raised in the recent Motion to Council from Councillor A S Fluker to its scrutiny workplan. The terms of the motion were as follows:

With reference to the Costs Decision Notice regarding the planning appeal determined on 21st March 2022 Ref/APP/X1545/W/2 13283478 Land 250M North of 16A Maldon Road, Burnham on Crouch Essex.

Since losing the appeal the Council has agreed to pay the appellants costs of £230,000. The Council's own legal fees are £30,000. These costs will be met by Council Taxpayers.

Motion:

- 1. That Council considers the Inspectors Notice and in particular paragraph 18 and takes the appropriate action.*
- 2. That Council considers whether the 'unreasonable behaviour' of members in determining the application resulted in the appeal being lost and a costs of £230,000 being paid to the appellant and takes the appropriate action.*
- 3. That Council considers, bearing in mind members overturned the Planning Officers recommendation to approve the application, why no members attended the appeal to evidence and give weight to their decision.*
- 4. That Council considers why members went against the Officers decision to approve the application, the advice that Council was unlikely to win any appeal and considers why under those circumstances the appeal was defended at a cost of £30,000.*

2. The background facts to the consideration and determination of the application in question are as follows:
 - Application in question originally determined by District Planning Committee in June 2021 – a Committee consisting of all Members of the Council and charged with making strategic planning decisions
 - 25 of the 31 Councillors were present – with one abstention, all Members present agreed to refuse the application contrary to Officers' recommendation of approval
 - The matter was brought back to the Committee in January 2022 in view of the extreme difficulty Officers had in progressing the subsequent appeal, and the likely conflict there would have been between the professional Officer's proof of evidence and the representation of the Council's defence of its decision including possible Member involvement
 - The decision on review to accept the appellant's 'without prejudice' offer to resubmit the application for fresh consideration, and if approved the outstanding appeal would be withdrawn and no application for costs made. Despite this however, the appellant decided to continue with the appeal.
 - The appeal was upheld and an award of costs made. Despite the interim review by the Committee, the Planning Inspector's conclusions and decisions were made on the basis of the wrongfulness of the original decision, and the Council seeking to continue to defend such a weak position.

3. A relevant extract from the Inspector's Costs Decision is as follows:

16. *The original decision of the Council was therefore unreasonable, both on the merits of the scheme and also because the Council did not properly apply the 'tilted balance'. By the time of the appeal, and throughout the appeal process, it was clear that the Council understood that the 'tilted balance' was engaged. However, it did not take the next logical step, which was to withdraw from defending its indefensible position, and instead proceeded to try and claim that the appeal should fail, even when applying the 'tilted balance'. This is an untenable and unreasonable position in light of the substantial benefits of the proposal, which were agreed with the Council, and the minor harm to character and appearance as the only meaningful harm. Overall, the Council's actions have resulted in the delaying of development which should clearly have been permitted.*

17. *The proposal should not have been refused in the first place, and should not have then been actively defended at appeal. This is particularly galling in light of the Council's agreed housing land supply of only 2.92 years. It is failing, very significantly, to secure the 5-year supply of housing land for which it should be striving. In addition, the appeal proposal is for two types of residential accommodation, older persons and affordable housing, that are most in need in the District, as set out in the Council's own Maldon District Local Housing Needs Assessment Final Report, dated May 2021. The need for both types of accommodation is acute and growing.*

Conclusion

18. *Taking all of the above into account, I therefore find that unreasonable behaviour by the Council resulting in unnecessary or wasted expense, as described in the PPG, has been demonstrated and that a full award of costs is justified.*

Additional scrutiny item

4. Added to this scrutiny item is the reference from the July meeting of the Council to look at Planning decision-making, the Council having emphasised the need for more objective and evidence-based decision-making in the future. This arises from an appeal decision and an award of costs in relation to application ref 20/0166/FUL at land south of Charwood and east of Orchard House, Stoney Hills, Burnham on Crouch.
5. Application 20/0166/FUL had originally been refused by the South-Eastern Area Planning Committee in February 2021, contrary to the Officers' recommendation, and the refusal was maintained on review by the District Planning Committee in June 2021, albeit for a reason at variance with that previously agreed by the Area Planning Committee. The reason for refusal agreed by the Area Committee on application 20/0166/FUL was -

1. *The proposed development, due to its style, design and bulk would result in a dominant and contrived development which would result in undue harm to the character and appearance of the surrounding area and the amenity of neighbouring sites, contrary to policies S1, S2, D1, H4 of the Maldon District Local Development Plan.*

2. *It is considered that the development would result in demonstrable harm to the residential amenity of the occupiers of the neighbouring dwelling to the west, Orchard House, contrary to policies D1 and H4 of the Maldon District Local Development Plan.*

A decision notice based on the reason agreed by the Area Committee was however not issued and the application was put to the District Planning Committee for determination afresh with a recommendation of approval. This was not accepted and the reason for refusal agreed by the District Planning Committee, and based on objection raised at that meeting and having regard to Officer advice, was as follows:

1. *The design of the dwelling is considered to be incongruous and contrived which would cause harm to the character and appearance of the surrounding area, contrary to policy D1 of the Local Development Plan (LDP).*
 2. *The proposal would result in demonstrable harm to the residential amenity of the western neighbour of Orchard House by resulting in a harmful loss of outlook from this neighbouring dwelling, contrary to policy D1 of the LDP.*
6. Application 20/0166/FUL proceeded to appeal, although in the District Planning Committee's reasoning the demonstrable harm to residential amenity was specified, the appeal Inspector felt that the reasons had not been substantiated. A relevant extract from the Inspector's Costs Decision is as follows:

10. As will be seen from my decision issued on this case, I have decided in favour of the appellant on the substantive question of whether the proposed development should be permitted. As will be seen from my decision, on the issue of design I noted that there was no specific criticism by the council, and for my part I considered that the proposed dwelling relates well to the character and appearance of the surrounding area, making a positive contribution to it. This judgement might not be shared by others, but any alternative view must be supported by reasons. That was not done in this case.

11. Again, in relation to the second issue, the council has not explained how the alleged loss of outlook to the Orchard House occupants would result from the appeal proposal, and I was left to conjecture what form of loss might be involved.

12. I concluded that both refusal reasons in the case had not been substantiated, and did not form any justification for the refusal of planning permission.

13. I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the Planning Practice Guidance, has been demonstrated and that a full award of costs is justified.

Conclusions and initial response to the Committee

7. The Working Group's initial conclusions centre around the following elements -
- A 'constitutional' intervention or brake to enable Planning and Legal Officers to review the implications of Officer overturns on strategic and other applications before a decision is finalised.
 - The review and promotion afresh of the Planning Appeals Protocol and also the Planning Guidance on decision making set out in the Constitution.
 - Identification of further Member training issues.
 - A review of the style/approach of Officer reports on planning applications to give greater balance of argument to assist Members.
8. On the first of the above, the context for this would be the balance between the speed of determination and quality of decisions, and a clearer understanding of the need to substantiate the overturning of an Officer's professional recommendation and the risks involved. There is clear evidence that a number of authorities have a mechanism of this nature, and options appear to include –

- Introduction of concept of 'minded to approve/refuse' motion based on a clear if not detailed reason
 - Delegate decision to Director in consultation with Chairman/Vice-Chairman with backstop of reference back to original Committee
 - Officers request deferral in exceptional cases, or Solicitor being the arbiter of issues and requesting deferral for further advice/consideration
 - Committee decision to defer for this precise reason
 - Area Committees automatic referral to District Planning Committee on overturns
 - A single Planning/Development Control Committee would enable establishment of a Planning Referrals Committee
 - Strengthening the Planning Appeals Protocol with Members leading on Statements/Evidence
 - With 'Minded to' deferrals, only those present at the original Committee may vote at subsequent meeting if the application was referred back
 - Stronger and recorded reasoning for departure from the Officer recommendation or giving different weight to material considerations
9. As mentioned in 7. above, it is thought to be both appropriate and necessary to revisit the Planning Appeals protocol and for it to be commended to the Council for adoption afresh. This protocol is appended to the Code of Good Practice on and Guidance on the Conduct of Planning Matters included in the Constitution, and provides important guidance for the management of Planning Appeals, including the involvement of Members.
10. The question of how planning decision making is approached and undertaken ties in with the issues raised by the above Notice of Motion, and this could even extend to a review of the existing arrangements. The Council has already emphasised the need for more objective and evidence-based decision making in the future, and perhaps the relevant section of the Planning Guidance document included in the Constitution needs revisiting and strengthened.
11. The identification of further Member training issues to be addressed is vital to this process. Training needs to embrace the important messages and conclusions coming out of this scrutiny and which are likely to be cemented in the revision of protocols and guidance. It is not difficult to see that the demands of delivering sufficient and regular training to all Members given their role in planning decision-making would be eased somewhat if there was a single Planning/Development Control Committee whose Members could be trained in a more specialist way. It would also ease the burden of having to enforce the restriction on voting for those Members whose training was not up to date.
12. A wider issue linking to these matters is the recent corporate governance audit which highlighted that Members had not properly considered the earlier Planning Advisory Service recommendations that had been reported to Council. One recommendation pointed to a move to a single Planning/Development Control Committee consisting of well-trained Members to replace the current Area Planning Committee format which it was felt could lead to inconsistency of decision-making and potential challenge.

13. The Working Group feels that a review of the style/approach of Officer reports on planning applications should be undertaken with a view to a more balanced presentation being achieved which would be thought helpful to Members.

