

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

Summary of issues for further consideration and report to the Committee

- Constitutional intervention or break upon overturn of Planning Officer's recommendation – alternative pathways – paras 13-16
- Planning Appeals Protocol refresh with strengthening of Member involvement – paras 17-18
- Member Training – improved opportunities for bespoke and specialised training with a single planning committee – paras 19-20
- Officer reports on planning applications – review of format and technical presentations – paras 21-26
- New protocol on 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/213283478 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.

Proposed recommendations and options for learning outcomes

7. The Committee on 24 October 2022 asked that the Working Group's initial conclusions be developed in greater detail to enable it to be in a position to assess the potential for making a response to the Council or recommendations to other Committees. The Working Group has given further consideration to these and added further items as follows -
- 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 and language content of Officer reports on planning applications to give greater clarity and balance of argument to assist Members – supplemented by,
 - The concept of technical briefings on the more complex applications prior to the actual committee meeting, and
 - The preparation of a separate glossary document for Members assistance, covering a range of technical terms and acronyms
 - The preparation and adoption of a new single protocol on Planning Decision-Making as the logical conclusion of this scrutiny exercise

Constitutional intervention or brake upon overturning the Officer's recommendation

8. The context for this is the need to strike a balance between the speed of determination and quality of decisions and being able to substantiate the overturning of an Officer's professional recommendation, understanding the risks involved. Depending on the precise mechanism chosen, the concept of being 'minded to approve/refuse comes into play, in other words the determining Committee giving an indication of its proposed decision and reasons for it, alongside a clearly stated reason for actually overturning the Officer's recommendation. The Probity in Planning document produced jointly by the Local Government Association and the Planning Advisory Service originally in 2013 and updated in 2019 advocates either adjourning for reasons to be discussed and agreed by the Committee and where there was concern about the validity of reasons possible deferment to another meeting to have the putative reasons tested and discussed.
9. Further context is provided by various research and advice papers. In 2018 Lichfields, the planning and development consultancy, produced a paper entitled 'Refused for good reason?' which examined the tensions between the delivery of housing and quality of decision-making on applications. Among the recommendations were that Councils should seek independent advice where is disagreement between the planning officer and members on a technical issue, and that there should be provision for a 'cooling off' period to enable advice to be sought about appeal prospects before a refusal is confirmed.

10. As the Nolan Committee on Public Life report acknowledged, there is nothing intrinsically wrong if planning committees do not invariably follow the advice of officers. Planning officers exist to advise, and committees are entitled to reach their own decisions by attaching different weight to the various planning criteria. Councillors must still however make their decision within the legal and policy framework that exists, including the NPPF and the Local Development Plan.
11. An advice paper produced by Cornerstone Barristers in July 2020 looked in detail at best practice for ensuring the planning committees are advised of the potential risks on appeal and of a costs award. In a Court of Appeal case involving Babergh DC in 2019 the Court emphasised the importance of planning authorities not allowing the potential consequences of a decision for their own resources to influence the exercise of planning judgement. In a case involving Tonbridge & Malling BC in 2020 this issue of taking immaterial considerations into account was explored. While it was appropriate for officers to advise members on the potential cost and reputational implications of refusing permission, this should not be confused with or taken into account as material considerations in the planning analysis or in the exercise of planning judgement. Any such advice should be provided distinct from the planning assessment.
12. Planning Policy Guidance states that the aim of the costs regime is in part to encourage local planning authorities to properly exercise their development management responsibilities, to rely only on reasons for refusal which will stand up to scrutiny on the planning merits of the case (supported by robust evidence), not to add to development costs through avoidable delay.
13. This Council's own adopted Planning Guidance included in the Constitution reflects much of the key messages set out above, and states that *"Depending on the circumstances and complexity of the case it may be that Officers will need to consider those implications in greater detail and report back. Any proposal for deferment must be disposed of ahead of any conclusion being reached on the decision itself."* If the Committee is clear in all respect as to its reasoning, and Officers are content that the reasons can be substantiated and supported through appeal, then an operative decision can be made. In all other respects however, an intervention or brake should be invoked, the distinct options would involve one of either –
- Delegation of final decision to Director in consultation with Chairperson/Vice-Chairperson and Legal Officers with the backstop of reference back to the original Committee
 - OR
 - The Committee or Director/Legal Officer seeking a deferment for further Planning and Legal advice and consideration
- with the Operating Protocols for the Committees, and the Council's own Planning Guidance, as set out in the Constitution, being strengthened accordingly.
14. Clearly the **delegation** option will give rise to less delay and may result in endorsement of the 'minded-to' decision, but equally ought to enable the issue of a decision in accordance with the Officer's recommendation if the alternative cannot be substantiated. In line with normal delegation principles, the decision here would rest with the Director.

15. The **deferment** option will enable a review to be undertaken and reported back to the original Committee. Only those present at the original Committee meeting may vote at the subsequent meeting on reference back since it is important that Members are present for the entirety of the debate.
16. The Council's existing planning committee structure (see also para. 20) makes it difficult to introduce any other form of intervention or brake in the sense that the Area Planning Committees and the District Council are autonomous, save for the fact that the Director does have the power to refer an application or ask for an application to be referred to the District Planning Committee. The existence of a single development control committee would make it easier for a Referrals Committee to be introduced for the purposes under consideration here. In the absence of that however, the terms of reference/operating protocols for the Area Planning Committees could be amended to **require all Officer overturns to be referred to the District Planning Committee**.
17. Where decisions are taken contrary to the Officer's recommendation it is important to consider the role of Members in supporting the Council's decision (as distinct from the Officer's recommendation, which will be examined) to be defended in the subsequent appeal alongside the reasoning for going against the Officer's recommendation. This is covered in the Planning Appeals Protocol which is appended to the Code of Good Practice and Guidance on the conduct of Planning Matters which is included in the Council's Constitution. The document, which is now submitted for review and possible adoption afresh, envisages the role and involvement of Members in Planning Appeals as good practice – perhaps this should be strengthened to become a requirement. Equally it should reflect practice advice issued by the Royal Town Planning Institute which professional planning offices must heed. This recognises that an officer whose professional opinion is quite distinct from the decision to be defended on appeal may not be the best expert witness. It states "It is better to avoid the situation where someone is giving evidence that they do not agree with. It is preferable to call someone else, who is in a position to speak with conviction about the harm that the scheme would cause or why the planning balance should be weighed in favour of refusing the scheme. For example, the Chair of the Planning Committee could be called or an external planning consultant could be appointed."
18. The question of how planning decision making is approached and undertaken ties in with the issues raised by the 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. Equally, pulling together some of the important messages and provisions around decision-making into a single protocol document for the Planning Committees, and its inclusion in the Constitution and to be referenced on agendas, might give added focus.

Training and Committee Structure

19. 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.

20. A wider issue linking to these matters, and further to what is said in para. 16 above, 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.

Officer reports and presentations on planning applications

21. The Working Group has suggested 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. It is evident that the existing style and approach is consistent with that of other authorities in Essex in the sense that reports are led with an executive summary and recommendation, with the detailed analysis of the various and material issues, and conclusions following. It may be that unless there is a clear policy objection, very often there is not a balancing of issues to be laid out, or rather that any balancing lies firmly on the side of a presumption to approve unless material consideration suggest otherwise. It may then be a question of the particular weight to be given to a material consideration.
22. The opportunity should be taken by Officers to look at refreshing the approach to reports, in particular the language used and with a view to briefer and summarising content without threat to the meaning. It is emphasised however that reports have to analyse planning and legal issues, often straying into quite technical areas and therefore technical language. They therefore have to be sufficiently robust to survive potential challenge and therefore the local planning authority's position in law.
23. The Council receives some very complex and challenging applications that can have some very technical challenges for the decision maker to wrestle with when coming to the determination of the planning application. It is accepted that the traditional approach to presenting items at a Planning Committee, supported by a presentation and an Officer's report, at times might not be the best method to assist Members in their ability meaningfully and effectively to engage in the decision-making process. There is the potential to allow for a 'technical' presentation to Members prior to the Committee meeting that may be able to deal with some of the more pertinent and salient questions on technical matters. This though would need to be balanced against the need to have an effective and transparent debate at the Committee meeting itself and the fact that if a Member was not able to attend the pre-meeting they would not be able to debate or vote at the decision-making Committee. Officers should also be asked to ensure that there is consistency of approach to their presentations to the Area Planning Committees.
24. The one area of balance which needs to come through in reports and be taken into account by Members is what is known as the 'Tilted Balance'. In accordance with paragraph 11 of the NPPF, decisions should apply a presumption in favour of

sustainable development, which for decision-taking means approving development proposals that accord with an up-to-date development plan without delay, or where there are no relevant development plan policies, or these are out-of-date. This means granting permission unless the policies in the NPPF that protect areas or assets of particular importance provide a clear reason for refusing the development or any adverse impacts of doing so would significantly and demonstrably outweigh the benefits when assessed against the NPPF policies as a whole. If the Council cannot demonstrate a five-year housing land supply, the 'Tilted Balance' of NPPF paragraph 11 is engaged and this weighs significantly in favour of approving applications for new housing. This must be covered in the assessment.

25. Officer reports do currently contain a section that brings together sustainability as defined within the NPPF and appropriate weight to be applied to the planning merit of the application due to the 'Tilted Balance' and the Council's lack of an ability to demonstrate a 5YHLS.
26. The Working Group also supports the idea of creating a separate glossary document for reference purposes by Members pulling together a range of technical terms and acronyms.

New Planning Decision-Making Protocol

27. The Working Group concludes that depending on how the Committee decides to deal with the issues arising here a logical outcome might be the creation and adoption (for inclusion in the Constitution) of a single Planning Decision-Making Protocol. This would draw together all the various components of advice and guidance already in the Constitution, as refreshed and added to, in one single document.

(see below for existing Planning Appeals Protocol)

MALDON DISTRICT COUNCIL PLANNING APPEALS PROTOCOL

1. ROLE OF MEMBERS IN COMMITTEE PLANNING APPEALS

1.1 Householder Appeal

- 1.1.1 The Member role is a collective Committee responsibility given that the critical factor with householder appeals, which do not involve providing any additional supplementary statements, is to ensure that the Committee's reasons for overturning Officer report recommendations are clear and based on sound planning reasons.

1.2 Member Involvement in Written Representation, Informal Hearing & Public Inquiry Appeals

- 1.2.1 Where the Committee overturns a recommendation, in addition to agreeing the reasons for refusal it would be sensible for the Committee to identify which member(s), subject to being suitably briefed, should to be involved with any subsequent appeal to help strengthen the Councils case. There are three options available to Committee any of which may be selected at the time the Committee decision is taken and thereby recorded in the Minutes. The Member(s) nominated by Committee to engage with any subsequent appeal include:

The Chairman of the Committee.

The Chairman of the Committee, and a local ward Member.

The proposer /or seconder of the motion at Committee.

- 1.2.2 It should be made clear that the nominating of a Member is not mandatory and entirely at the discretion of the determining Committee. Where a Member is nominated it is important that he/she understands the nature of the role as set out below, and that their appearance at a hearing or inquiry will be wholly as a representative of the Council to support the case around the Committee's decision.

1.3 Written Representation Appeal

- 1.3.1 Written representation appeals are the quickest and simplest appeals requiring Member involvement. They require a statement and site visit but these appeals are usually for smaller scale development such as a single dwelling or change of use.

- 1.3.2 Where the Committee overturns the recommendation the nominated Member will be engaged with the following:

- Letter sent to advise the nominated Member about the appeal, the name of the case officer and the date the Statement is due;
- Nominated Member should liaise with the case officer if required to discuss the policies, content to provide the outline for the Council Statement and cost claim (if relevant). Members' comments need to be made in writing to the case Officer.
- Typed statement with any necessary appendices to be prepared by the case officer. The nominated Member to review the Councils statement and make amendments where required and send back to the Officer.

Nominated Member to be advised of the date of the site visit.

1.4 Informal Hearing Appeal

1.4.1 Where the Committee overturns the recommendation the nominated Member(s) will be engaged with the following:

- Letter sent to advise the nominated Member about the appeal, the name of the case officer and the date the Statement is due;
- The nominated Member should liaise with the case officer if required to discuss the policies, content to provide the outline for the Council Statement and cost claim (if relevant). Member comments where required need to be made in writing and forwarded to the case Officer.
- Typed statement with any necessary appendices to be prepared by the case officer or planning consultant. The nominated Member to review the Council's statement and make amendments where required and send back to the Officer.
- Prior to the hearing, a meeting will be held between the Member and case officer and external witnesses and solicitor if necessary to consider the issues and the appellant's case.
- Nominated Member to attend the Informal Hearing either in an observer or as part of the Council team.
- Nominated Member to be advised of the date of the site visit.

1.5 Public Inquiry

1.5.1 Where the Committee overturns the recommendation the nominated Member(s) will be engaged with the following:

- Letter sent to advise the nominated Member about the appeal, the name of the case officer and the date the Statement is due.
- The nominated Member should liaise with the case Officer to discuss the policies, content to provide the outline for the Council Statement and cost claim (if relevant). Member comments where required need to be made in writing and forwarded to the case Officer.
- Typed statement with any necessary appendices to be prepared by the case officer or planning consultant. The nominated Member to review the Councils statement and make amendments where required and send back to the officer.
- Prior to the Public Inquiry, a meeting will be convened by the Council's legal representative between the Member, the case officer and any external witnesses / experts where necessary to consider the issues / tactics and the appellant's case.
- Nominated Member to attend the Public Inquiry either in an observer or as part of the Council team.
- Nominated Member to be advised of the date and attend the site visit where required.

1.6 Director of Service Delivery

1.6.1 In managing the Planning Appeal process the Director of Service Delivery will:

- Determine on a case by case basis where it would be necessary to either seek the nominated Member or an external planning consultant to represent the Council at either an Informal Hearing or Public Inquiry.
- Wherever practical seek to recover the Council's costs from applicants in preparing for and undertaking an appeal.
- Where required, request the local Ward Member assistance in circumstances where local knowledge is paramount and invaluable to the appeal including appeals that may arise from planning enforcement action and a refusal of a Certificate of Lawfulness.

1.7 The Role of Members as Private Individuals and Parish /Town Councillors

1.7.1 In situations where Members have clearly demonstrated a 'closed mind' on a planning application prior to consideration by Committee, they will not be permitted to be involved in the determination of that application or the subsequent appeal statement or process. In this case, or where a Member does not support the Council decision irrespective of the type of appeal, a Member may decide to make their submissions to an appeal which will be in either a personal capacity only or in their role as a Town / Parish Councillor.

1.7.2 It may be that on occasions electors may expect that their Ward Member(s) will attend a hearing or inquiry to further represent their interests and view. This can be seen as part of the democratic process, and a Ward Member wishing to do so should take the opportunity of first being fully briefed by Officers on all the issues the subject of the appeal.

2. REVIEW OF REASONS FOR REFUSAL

2.1 On occasions during the course of an appeal the Council may formally be requested by or on behalf of the appellant to reconsider its reasons for refusal. Any review shall be undertaken at the level the original decision was made and on report of the Director of Service Delivery only.

2.2 Where a committee has not formally reconsidered its reasons for refusal, and there is insufficient time to do so, then in order to ensure the Council minimises its exposure to cost awards against it, the Director of Service Delivery in managing the appeal process will act in consultation with the Leader of the Council, the Chairman of the relevant Planning Committee and the nominated Member.

Originally endorsed by Planning and Licensing Committee - November 2012