

Report to Planning Services Scrutiny Standing Panel

Date of meeting: 12 February 2009

Subject: Planning Decisions

Officer contact for further information: J Preston, Director of Planning Services

Committee Secretary: M Jenkins, Office of the Chief Executive



Recommendations:

- (1) To consider the scrutiny review request set out in this report and the initial response of the Director of Planning & Economic Development; and**
- (2) To consider any further action required or a response.**

1. The Overview & Scrutiny Committee has referred to this Panel a scrutiny request from Councillor Mrs A. Cooper covering a number of questions regarding planning decision making, the possibility of challenge to decisions, the advice of officers, how policy is to be applied, awards of costs and use of consultants and other advice.

2. A copy of Councillor' Cooper's submission is attached as Appendix 1 to the is report. Each section of that submission is dealt with in turn below by way of comments from the Director. Of Planning & Economic Development.

(a) Summary of issue you wish to be scrutinised:

Comment:

3. When Councillors consider reports about planning applications it is important to consider the report, and what is recommended. Indeed, there are legal duties placed on the decision taker including the consideration of Development Plan policies in Regional, saved County and saved Local policies. Given those duties, the relevant protocols and training for members emphasise the importance of this approach.

4. The legal references is Section 38 (6) of The Planning and Compulsory Purchase Act 2004 (previously Section 54A of The Town and Country Planning 1990 as amended). This section states that "If regard is to be had to the development plan for the purpose of any determination to be made under the Planning Acts, the determination must be made in accordance with the plan unless material considerations indicate otherwise." That said, most developments would involve the consideration of several policies, and those policies may not make the decision a simple one; judgements are called for, as is the weighing up of policies.

5. The Planning Protocol deals with the governance issues which planning decisions raise. Paragraphs 14, 15, 16 and 17 in the Protocol refer.

(b) Questions that Arise: "Can Officers/ Councillors disregard policy, if so in what circumstances?"

Comment

6. Planning officers are expected to defend their recommendations if a case is taken to appeal. They will occasionally defend decisions that have gone against their recommendation, particularly if a case was finely balanced and/or planning reasons for the refusal have been given. Sometimes other planning professionals (e.g. consultants) are used to take such appeals.

7. The appeals record of the Authority over many years can be interpreted as showing that;

(a) officer advice is open to challenge in an Inquiry; and

(b) decisions by Councillors contrary to Officer recommendations can withstand a challenge at appeal.

8. It is not a question of policies being disregarded. The Authority's legal duties and the Protocol, mean that the true position must concern the weight that to be given to any particular policy in any one case. This does vary from case to case.

(c) Questions that Arise: "In planning, "Can it (ie (b) above) lead to an unsafe decision?"

9. An unsafe decision could arise, for example, if the decision taken was considered unreasonable, if the legal duty was misquoted or misapplied, or where material considerations that led to a decision were different from those which planning policy and practice might suggest should be applied, (eg if the weight of objections were to be given as the sole basis for the decision).

10. In some circumstances, this situation might lead to the intervention of the Monitoring Officer, lead to a complaint to the Ombudsman, or produce a basis for a Judicial Review of the decision.. More frequently, this might lead to a lost planning appeal and an award of costs against the Authority.

(d) Questions that Arise: "In the event of a claim against this Council can it claim against the County if it is their Officers refusing to stand by their original decision?"

11. EFDC will usually receive the benefit of technical consultation responses from a number of organisations. This advice needs to be weighed with other considerations, but EFDC would be responsible for defending the decision taken..

(e) Questions that Arise: "If this Council is paying for professional advice (i.e. Highways) why should it have to pay for more advice to compensate for the original advice being withdrawn?"

12. Having taken a decision, it is up to EFDC to defend that decision, or, if time allows, to review it. If EFDC is seen to take an unreasonable/undefended case at appeal, it risks having costs awarded against it. Similarly, if it withdraws any part of its case late in the process, then it is similarly at risk. It follows that it will be prudent to see if a separate professional party can support that part of the case, so as to avoid being judged to have acted unreasonably.

(f) Questions that Arise: "In the event of this happening with Planning Applications should they not always be discussed in public?"

13. Planning applications are determined in the public domain, most obviously by Committees. This question appears to be about what to do if part of the determined application is considered vulnerable at appeal. One could be very open about that, but if members adhere to their original decision even where officers have drawn attention to a vulnerability for the council, this might simply emphasise that weakness if aired in a public meeting, even being interpreted by others as unreasonable behaviour.

Appendix 2 shows the "probity in planning" report to the December Area Plans Subs.

