

# **Report to Overview and Scrutiny Committee**

**Date of meeting: 16 April 2009**

**Subject: Considerations of Planning Applications**

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**Committee Secretary: Adrian Hendry**

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## **Recommendation:**

**To note the attached FAQ's on Planning, resulting from Councillors Mrs Cooper's request, considered by the Planning Services Scrutiny Standing Panel.**

## **Report:**

### **Frequently Asked Questions about Councillor consideration of planning applications 2009**

1. Councillor Mrs Cooper made a request for scrutiny, by the Planning Services Scrutiny Panel in November 2008. Having discussed these matters the Panel considered that the points should be presented as an FAQ style document, so that a wider audience would be aware of the points.

#### **Considering Planning and other applications**

2. When considering a Planning Application, Councillors should be mindful to consider Officers recommendations. They should also consider these recommendations in conjunction with the Council's own policies or the County Council's policies.

3. In the event at a later stage the decisions are to be challenged i.e. at a Public Enquiry or complaint etc and the Officers then refuse to support their recommendations made in line with their own policies what are the likely repercussions for Councillors who have made the final decision?

#### **Response:**

4. When Councillors consider reports about planning applications it is important to consider the report, and what is recommended. Indeed, there are legal duties on the decision taker to do just that, including the consideration of Development plan policies in the Regional, saved County and saved Local policies; given those duties it would be surprising if anyone took a different approach, and this is emphasised in the relevant protocols and training which Councillors are given.

5. The legal references are Section 38 (6) of The Planning and Compulsory Purchase Act 2004 (some Councillors may be more used to previous references to Section 54A of The Town and Country Planning 1990 as amended) This 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."

6. The majority of matters which come before Councillors for decision will be standard applications for planning permission made pursuant to Section 70 of the Town and Country Planning Act 1990 (as amended). Section 70(2) provides a statutory requirement that the

authority dealing with the application shall have regard to the provisions of the development plan, so far as material to the application, and to other material considerations.

7. The reference to the word 'If' in Section 38 (6), is to make it clear that the duty to have regard to the development plan will not apply in cases where there are special areas of control, such as listed building consent, tree preservation order consent or hazardous substances consent, where there are no statutory requirements to have regard to the development plan.

8. The Planning Protocol references are at T1 of the EFDC Constitution, in particular paragraphs 14, 15, 16 and 17.

9. 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.

### **Questions that arise:**

#### **1. Can Officers/ Councillors disregard policy, if so in what circumstances?**

Professional Officers are expected to defend their recommendations if a case is taken to appeal, and will occasionally defend decisions that have gone against recommendation, particularly if the case was finely balanced, and/or planning reasons for the refusal have been given. Alternatively other professional consultants can be used to take such appeals.

The appeals record of the Authority over many years does not show that:

- Officers are always correct.
- Councillor decisions contrary to Officer recommendation are always overturned at appeal.

It is not considered prudent to suggest that policies have been disregarded, because of the aforementioned legal duties and the Protocol, however the weight that is attached to any one policy in any one case, can and does vary.

#### **2. In planning can it lead to an unsafe decision?**

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 different to that which planning policy and practice might suggest were applied, for example, that the weight of objections alone were to be given as the basis for the decision.

This might lead to the reference of the case to the Standards Board/ Standards Authority, The Local Government Ombudsman, or produce a basis for a Judicial Review of the decision.

More usually, it leads to a lost planning appeal and an award of costs against the Authority.

#### **3. 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?**

EFDC will usually receive the benefit of technical consultation responses from a number of

organisations, which need to be weighed with other considerations, and EFDC would be responsible for then defending the decision taken. If the County Council changed its mind, then perhaps the real sanction would be to apply political pressure.

**4. 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?**

Having taken a decision, it is up to EFDC to defend that decision, or, if time allows, to review that decision. 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 determined to have acted unreasonably.

**5. In the event of this happening with Planning Applications should they not always be discussed in public?**

Planning applications are determined in the public domain, most obviously those cases being determined by Committee. But, perhaps this point is about what to do if part of the determined application is considered vulnerable at appeal. One could be very open about that, but if Councillors insisted on sticking to what they see as their original decision, but where Officers have drawn attention to a vulnerability, then that may simply end up as emphasising what comes to be seen as unreasonable behaviour.