



Leeds
CITY COUNCIL

Originator: Caroline Allen
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**Joint Report of the Chief Planning Officer and the Chief
Officer for Legal Licensing & Registration**

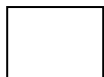
Meeting: Joint Plans Panel Meeting

Date: 23rd September 2010

**Subject: High Court challenge concerning grant of planning permission (07/06905/FU)
for the demolition of workshop and erection of block of 12 flats at 10 Wide Lane,
Morley, Leeds, LS27 9BL**

Electoral Wards Affected:

All



Ward Members consulted
(referred to in report)

Specific Implications For:

Equality and Diversity

Community Cohesion

Narrowing the Gap

RECOMMENDATIONS:

**1. That Members note the report, and in particular the changes to the following
working practices within Planning Services:**

**(i) the extent and nature of the planning obligation (including where appropriate the
payment of a commuted sum) is now agreed as part of the heads of terms of the legal
agreement and the agreement itself sets out the terms of its provision. In the case of
commuted sums this will include the identification of the locality where the money is
to be spent.**

**(ii) closer working between planning and legal officers on the most complex and
sensitive planning cases has been introduced.**

**(iii) case officers are to be reminded of the need to be open about matters of
procedure and how it is intended to progress a planning application towards
determination.**

1.0 Purpose of This Report

1.1 On 15th February 2010 the High Court quashed the planning permission dated 7 February 2008 for the above stated development. At the Joints Plans Panel of 1st July 2010 Members requested that a report be presented to this Panel that set outs:

- the background to the case,
- explains why the case was contested, and
- details the implications arising from the judgement.

1.2 This report concentrates solely on the planning aspects of the case. A separate report is being presented to the Corporate Governance and Audit Committee (CGAC). The

purpose of the CGAC report is to outline to members lessons learned from the case, particularly in terms of governance arrangements approved at the Annual Council meeting.

2.0 Background

- 2.1 On 7th February 2008 planning permission was granted for the redevelopment of 10 Wide Lane, Morley for a development of 12 flats with associated parking. This decision was taken by a principal planning officer pursuant to the Chief Planning Officer's subdelegation scheme. The site is prominently located at a road junction, is located on the edge of Morley town centre and adjacent to the conservation area. The site constitutes previously developed land and is in a sustainable location. These factors in combination with the enhancement to the character of the area and the adjacent conservation area carried significant weight in the decision to grant planning permission.
- 2.2 The grant of planning permission was subject to certain planning conditions including ones covering the following matters:
- Details of a scheme of greenspace to be submitted and approved by the local planning authority (condition 2).
 - The maximum achievable visibility splays shall be provided at the access to the site (condition 6)
 - Development shall not commence until potential land contamination has been investigated (condition 14), that a remediation scheme to render the site suitable for use shall be submitted for approval (condition 15), that 3 working days notice shall be given prior to undertaking remedial works (condition 16), that remedial works shall be carried out in accordance with the approved statement (condition 17), if this is not possible a revised remediation statement shall be submitted (condition 18), if significant unexpected contamination is found works in the affected part of the site shall stop until a proposed method of dealing with the contamination is agreed (condition 19) and validation report shall be submitted that sets out how the site has been made suitable for use (condition 20).
- 2.4 During the consideration of the application representations were received from Morley Town Council (signed by Councillor Leadley) and from 4 local residents. The latter included a lengthy letter of objection from a Mr. Mark Snee and he would subsequently challenge the decision. In a letter dated 21st November 2007 the Town Council supported the scheme but requested that details of amenity space and parking be revised. Following the receipt of this letter further negotiation took place with the applicant and revised plans were submitted that addressed the concerns raised by the Town Council.
- 2.5 In a letter dated 5th February 2008 Councillor Tom Leadley requested that the application be reported to Panel for determination "*...to allow the Panel to judge challenges from a neighbour's representative to the likely advice from officers, in particular about the height and massing of the of the proposed building, the proposed highway access, and loss of employment land*". This letter was written following a conversation that Councillor Leadley had with the case officer when he (Councillor Leadley) was informed that officers were to determine the application under delegated authority. The Judge noted, however, that Councillor Leadley's request fell outside of the terms of the exceptions to the delegation scheme to the Chief Planning Officer as he is not a ward Member and the letter was received after the period that ward Members are given for the submission of such requests. Nevertheless it was

accepted by the council in evidence that consideration would have been given to the request. In any event the case officer and the officer with delegated authority did not see this letter until after the application had been signed off. Although the letter was handed into the reception desk on 6th February it was then placed into the internal post system and did not arrive with the case officer until 11th February (4 days after the planning permission was issued). This is addressed at paragraph 5.5 below.

3.0 The High Court Challenge

3.1 Technoprint plc and Mark Snee (the Claimants) challenged the council's decision to grant planning permission by way of judicial review. The challenge was brought on the following grounds:

1. That the decision to grant planning permission was reached in a manner which was procedurally unfair;
2. That the planning officer was not authorised to grant planning permission since no valid scheme of delegation existed at the time the permission was granted;¹
3. In the event that there was a valid scheme of delegation at the time, the planning officer did not have authority under that scheme to take the decision and the application should have been referred for consideration by the Plans Panel;
4. The decision to grant planning permission was irrational or unreasonable.

3.2 The Claimants' conclusion, set out in their Statement of Facts and Grounds at paragraph 52 succinctly sums up their case as follows;

“This was a hasty and ill-considered decision rushed through the delegated decision making process at the last moment, in the face of clear concerns from the Claimants and an elected member, and leaving a number of very important matters to be dealt with by way of condition which should have been addressed before planning permission was granted. The application should have been referred to a Plans Panel and it ought not to have been successful.”

4.0 The High Court Decision

4.1 On 15 February 2010 the court considered the Claimants' three 'planning' grounds of challenge (grounds 1, 3 and 4). Mr. Justice Wyn Williams who gave the judgment found for the council with regard to grounds 1 and 3 but upheld ground 4 and quashed the planning permission. He concluded that the decision to grant planning permission was unreasonable or irrational because no reasonable planning authority would have granted planning permission subject to conditions 2 and 14-20 inclusive relating to greenspace and contaminated land respectively.

Ground 1

4.2 With regard to Ground 1 (procedural unfairness) it was the Claimants' case that the decision to grant planning permission was reached in a manner which was unfair to them. The Claimants had submitted letters of objection to the planning application and had made enquiries of the case officer by email as to whether the application would be determined by an officer or by Panel. Councillor Leadley also made enquiries with

¹ This ground was considered separately by the Court and in advance of the other 3 grounds. The challenge on this ground was unsuccessful.

the case officer prior to the application being determined, although a letter from Councillor Leadley requesting that the application be considered by the Plans Panel was not received by the case officer until after the decision to grant permission had been taken. It was the Claimants' case that these matters constituted procedural unfairness. The Court judgment considers these matters in some detail. Mr. Justice Wyn William's view was that the case officer should have but failed to inform the Claimants in a timely fashion that the application was to be determined by officers, and that he had failed to give straightforward answers to straightforward questions. However, Mr. Justice Wyn Williams went on to state at paragraphs 22 and 23 of the judgment that:

'the Claimants, themselves, did not at any time make representations to the [council] to the effect that the planning application should be determined by a Panel as opposed to an officer' and that 'that must be an important factor when considering whether the Claimants were treated unfairly.' (para 22)

'That does not mean, however, that the Defendant was under a legal obligation to provide accurate answers with the consequence that if it did not any planning permission it granted should be quashed on the grounds of unfairness. The Claimants had no right to make representations about whether the application should be dealt with by a Panel as opposed to an officer. No expectation had been raised by the Defendant to the effect that the decision should be made by a Panel- quite the contrary. At any time the Claimants could have made representations about how the application should be determined or ask Councillor Leadley to make representations as he did at a very late stage. Essentially the issue of whether the application was one which should be determined by an officer or by a Panel was one for the Defendant to determine in accordance with its own criteria' (para 23)

- 4.3 Further, there was no evidence that any legitimate expectation arose in the minds of the Claimants that the application would be determined by a Panel. Mr Justice Wyn Williams went on to say that even if he was wrong in his conclusion, he would not have used his discretion to quash the permission in this case as it was clear that the planning officer had considered the exceptions to the delegation scheme and had concluded on planning grounds that it was not appropriate to refer the application to a Panel.

Ground 3

- 4.4 Turning to Ground 3 (the determination of the application fell outside of the scheme of delegation and should have been referred to Panel). The Court did not find against the council on this point and concluded *"...that the question for me [Mr. Justice Wyn Williams] is whether Mr. Smith's recommendation to the effect that planning permission should be granted under delegated powers was irrational or unreasonable"*.

Ground 4

- 4.5 The Claimants' Ground 4 claim that the decision to grant planning permission was irrational or unreasonable relied on a number of factors:

1. That the officer's report failed to take into account three specified material considerations;
2. That it was irrational to deal with the following matters by way of condition:
(1) provision of additional or improved green space (condition 2), when

absolutely no consideration has been given as to how this could actually be achieved (2), visibility splays (condition 6) when it was clear from an email from the Highways Engineer that the maximum achievable distance was not known and (3) investigation into and remediation of land contamination (conditions 14-20) when the council's Technical Officer for Land Contamination recommended on 28 November 2007 that a Phase 2 report be obtained from the Interested Party but none was ever requested let alone obtained, and on 5 February 2008 the Technical Officer stated that conditions have been recommended, 'although we would have preferred a site investigation up front'.

3. For all the above reasons, the decision to grant planning permission at this stage when the application in this form was not one that the Chief Planning Officer could reasonably take.

4.6 Mr. Justice Wyn Williams commented that the officer's report was lengthy and detailed and contained 'a long section in which it analysed what were described as the main issues in relation to the application.' (para 33). However, he concluded that it was unreasonable or irrational for planning permission to be granted in this case because of the officer's use of conditions and specifically the officer's approach to the provision of greenspace (condition 2) and to addressing contaminated land (conditions 14-20), both considerations being ones which the case officer identified as constituting main issues in the delegation report he prepared. Copies of the relevant conditions are attached as an appendix to this report.

4.7 With regard to the greenspace condition, the court was of the view that no reasonable decision-maker would have granted permission subject to such a condition without a clear and reasoned justification for its imposition and a careful appraisal of how it should be fulfilled. The Court also decided that it was unreasonable for permission to be granted when so many issues relating to potential land contamination were unresolved. The extent of any potential problem was simply unknown and it had been irrational or unreasonable for permission to be granted.

4.8 The greenspace condition was in a format which was often used, particularly at that time. Mr. Justice Wyn Williams makes reference to the relevant development plan policy N4, the fact that N4 (ii) permits the council to choose between requiring provision of land as greenspace or the payment of a sum of money and that it would have been open to the council to have entered into a section 106 agreement to that effect with the Claimants which would normally be executed before or at the time of granting planning permission. However that did not happen in this case, and there was nothing before the Court to demonstrate how the council intended the aims of that condition to be met. At paragraph 46 Mr. Justice Wyn Williams states:

"I stress that I am not reaching a conclusion that the condition in question was invalid. I confine myself to concluding that it was unreasonable or irrational to grant planning permission subject to such a condition".

4.9 Turning back to paragraph 45, the basis on which he said it was unreasonable or irrational was that:

"...so far as I can judge from the papers before me, no proper appraisal was undertaken of the legality of the condition or whether it would or could achieve what it was intended to achieve at any time before the planning permission was granted"

4.10 The Court also decided that it was unreasonable for permission to be granted when so many issues relating to potential land contamination were unresolved. The extent of any potential problem was simply unknown and it had been irrational or unreasonable for permission to be granted. Mr. Justice Wyn Williams commented as follows at paragraph 52:

“In my judgment, it was unreasonable for planning permission to be granted when so many issues relating to potential land contamination were unresolved. I appreciate that solutions can usually be found to overcome problems associated with land contamination. It does seem to me, however, that a reasonable local planning authority would have demanded much more information from the Interested Party before deciding to grant permission rather than grant permission subject to conditions when the extent of any potential problem was simply unknown. To repeat, land contamination was not identified as some peripheral issue in this case; it was identified as one of the main issues for consideration.”

4.11 Mr. Justice Wyn Williams placed significant weight on the exchange of correspondence between the case officer and the land contamination team in reaching his conclusion. In the consultation response the land contamination officer requested that further information be produced in light of the sensitive end use of the site (residential) and the history of the use of the site for commercial processes. What was required was an intrusive ground investigation to clarify the extent of any contamination that may exist. Influenced by the pressure to satisfy government targets for the determination of planning applications the case officer asked the question whether the need for intrusive site investigation could be conditioned. The reply given was there was a preference for the site investigations to be carried out prior to the grant of permission but in the circumstances a list of conditions were recommended to be attached to a planning permission. In this respect the following points should be noted:

- It is rare that the issue of contamination would go to the principle of development. More often than not it will be a case of agreeing a scheme of measures to render the site suitable for its end use (either through the removal of the contamination or preventing it from posing a threat to the end users of the site).
- The site is already developed and this limits the scope for intrusive investigation unless the site is cleared. It would clearly be unreasonable to require a developer or landowner to go to the expense of clearing a site in advance of any planning permission being granted.

5.0 Implications

5.1 The immediate implications from this judgment are of course that the planning permission (07/06905/FU) was quashed and therefore the application needs to be determined afresh ensuring that the flaws in the previous decision making process are properly addressed. With regard to any wider implications for Planning Services flowing from the judgment, the view of officers and counsel is that the decision is one that is based very much on its own facts. Mr. Justice Wyn Williams expressly stated that it was the lack of information before him to demonstrate both that the conditions were appropriate in this case and that the planning authority was clear about the aims of the conditions that led to his conclusion that it was unreasonable for planning permission to be granted with so much uncertainty left unresolved.

- 5.2 Officers did consider at the time whether to appeal the judgment, but concluded that as there were no wider implications this was not justified.
- 5.3 However, there are lessons to be learned, and in that regard it will be noted that since August 2009 (prior to the High Court judgment) it has not been the working practice of planning officers to attach conditions requiring a scheme of greenspace to be submitted. This matter is now dealt with by the use of Sec.106 Agreements. The extent of the greenspace provision (including where appropriate the payment of a commuted sum) will be agreed as part of the heads of terms of the legal agreement and the agreement itself will set out the terms of the provision of the greenspace. In the case of commuted sums this will include the identification of the area where the money is to be spent. The exception to this practice is where the application is submitted by the City Council – the City Council is not able to enter into a legal agreement with itself and therefore the only other realistic alternative is to impose a condition. Where such a condition is used the nature and the extent of the greenspace provision is agreed prior to the determination of the application and specified in the accompanying report.
- 5.4 It is clear that all planning applications should receive careful consideration and those statutory processes and best practices are adhered to. From time to time it will become apparent that particular decisions are at risk of being challenged by an interested party. This will most often be a result of matters of personal or commercial interest. In such circumstances the risk of a challenge being successful can be reduced through close consultation with colleagues in Legal Services. This could include advice and assistance in the drafting and preparation of reports and the construction of decision notices. It falls with the relevant Area Planning Manager and case officer to identify such cases and to ensure that the appropriate dialogue with Legal Services takes place prior to the issuing of the decision.
- 5.5 The way that Planning Services deals with the receipt of correspondence relating to planning applications has changed since 2008. Since February 2010 Public Access has been operational and this facilitates the submission of representations electronically and that correspondence is received straight onto the electronic planning application file. The case officer is alerted to its receipt via an email. Representations can also be submitted by letter and by email direct to the case officer. Such correspondence is then scanned onto the electronic file. However, if a letter is handed in at reception in a sealed envelope it will be placed in the internal post system. This is because of the regulations surrounding the submission of tender documents that requires such documents be opened at the same time. Accordingly, there can be a delay in such letters reaching the case officer.
- 5.6 The Judge did not find against the Council on the grounds of procedural unfairness. However, he was critical of the case officer in that he considered that the case officer's replies to direct questions about whether the application was to be reported to Panel were misleading. There is clearly a need for case officers to be open about such matters and they will be reminded of their obligation in this regard.

6.0 Costs of the case

- 6.1 At the Joint Plans Panel Meeting on 1 July, mention was made of the cost to the council of defending the Judicial Review proceedings. The council has now incurred barristers' fees of approximately £150,000 plus VAT and the in-house solicitors' costs of approximately £42,000.00. The council will also be responsible for some of the Claimants' costs although these have not as yet been quantified. It is not possible to

isolate with complete accuracy the costs associated with the 'planning' element of the challenge (because of the overlap) but a reasonable estimate would be approximately £12,000 plus VAT barristers' fees and in-house solicitor's costs of £5,500

- 6.2 Consideration was given to the possibility of settling the case rather than defend it, given the costs and uncertainties inherent in court proceedings. There was early consideration and exploration as to whether a settlement would be possible. A number of options were considered over a period of time. However, the view within the council, strongly supported by counsel, was that the council's case was very strong so far as the handling of the planning application was concerned. Accordingly it was ultimately decided that there was no justifiable basis for a settlement.

7.0 Conclusion

- 7.1 Overall, the Claimants have been successful in terms of obtaining the quashing of the permission but only on the basis of one fairly narrow aspect of their 4th ground, irrationality. The main thrust of their case centred on their assertion that the planning officer acted outside the scope of his delegated authority and this aspect was not ultimately successful.
- 7.2 The consistent advice that the council received from counsel throughout these proceedings was that the 'planning' grounds of challenge (i.e. grounds 1, 3 and 4) were weak and likely to fail. The focus of both parties was primarily on the more complex arguments surrounding Grounds 1 and 3. It is fair to say that it was not anticipated that the appeal would be successful on such narrow grounds.
- 7.3 The effect of the decision to quash the permission is that a fresh decision on the application is now required with regard to curing the defects identified by the Judge as fatal in the first decision. This is a permission relating to a stand alone development on a fairly small site and the quashing does not have any wider public interest implications in terms of the planning or regeneration of the area which would be affected as a result of the need for a further determination. The matter can be corrected through a proper and fair redetermination.

8.0 Recommendations

- 8.1 There are clear lessons that can be drawn from the High Court ruling and measures have already been put in place to improve the working practices within Planning Services. These include the use of Sec.106 Agreements (where appropriate) to secure greenspace provision and closer liaison with Legal officers on the most sensitive and complex of planning cases. In addition planning officers will be reminded of the need to be open with an applicant about how it is intended to progress with an application.

Background Papers

Planning application file: 07/06905/FU

High Court Judgment: 24/3/10

Appendix – Relevant conditions attached to planning permission 07/06905/FU

2. No development shall begin until a scheme for the provision of additional or improved greenspace, on or off site, to meet the needs of the development has been submitted to and approved in writing by the Local Planning Authority. The scheme shall include a timetable for the provision to be made and shall be carried out in accordance with the approved details.

Reason: To ensure the provision of greenspace in accordance with Leeds Unitary Development Plan Review (policies N2 and N4) and Supplementary Planning Guidance 4, Greenspace relating to new housing development.

14. Development shall not commence until potential land contamination at the site has been investigated and appropriate reports have been submitted to and approved in writing by the Local Planning Authority. Such investigations shall include as a minimum the preparation of a desktop study. The desktop study shall address the historical use and development of the site and its surroundings, the environmental setting, the potential for contamination to be present and the possible environmental risk it presents. If potentially significant risks are identified then an intrusive investigation involving characterisation of contamination and site ground conditions shall be undertaken. The site investigation report shall explain the methodology employed, an interpretative discussion of results and findings, a conceptual site model, a risk assessment and recommendations for further investigation/remediation.

Reason: To ensure that the presence of land contamination at the site has been determined and that the environmental risks it presents have been assessed.

15. Development shall not commence until a remediation statement has been submitted to and approved in writing by the Local Planning Authority, should the approved Phase II site investigation report conclude that remedial works are necessary. The remediation statement shall demonstrate how the works will render the site 'suitable for use' and shall describe the works in relation to the development hereby permitted. It shall include full details of any works to be undertaken, proposed site clean-up criteria, site management procedures and how the works will be validated.

Reason: To enable the local planning authority to determine whether the proposed remediation works will make the site 'suitable for use' and to ensure that contamination will not present any significant environmental risks.

16. Any works required by an approved remediation statement, including any additional intrusive investigation works or monitoring activities, shall not commence unless the local planning authority has received three working days' prior written notification of the date of commencement of such works.

Reason: To enable the local planning authority to monitor remediation works.

17. All remediation works shall take place in accordance with the approved Remediation Statement unless otherwise agreed in writing with the Local Planning Authority.

Reason: To ensure that the site is suitable for the development hereby permitted and that any contamination present at the site will not present a significant environmental risk.

18. In the event that remediation is unable to proceed in accordance with an approved remediation statement by, for example, reason of increased quantities of material to be moved or treated or contamination being more extensive than expected or other unforeseen circumstances, the Local Planning Authority shall be notified immediately. A revised remediation statement shall forthwith be submitted for the approval in writing of the Local Planning Authority. Works shall thereafter be carried out in accordance with the approved revised remediation statement.

Reason: To enable the Local Planning Authority to determine whether the proposed remediation works will make the site 'suitable for use' and to ensure that contamination will not present any significant environmental risks.

19. In the event that unexpected significant contamination is encountered during any development works including works required by an approved remediation statement, works in the affected part of the site must cease and the local planning authority shall be notified in writing immediately. The local planning authority may at this stage request that a remediation statement, outlining plans for further investigation and the proposed method of dealing with the contamination, be submitted for written approval prior to development works continuing in the affected part of the site.

Reason: To enable the local planning authority to ensure that contamination (expected or otherwise) at the site will not present any significant environmental risks and that the site will be made 'suitable for use'.

20. Within 3 months of the completion of the remediation works detailed in the approved remediation statement a validation report shall be submitted to and approved in writing by the Local Planning Authority. This report shall: -

- (i) Describe the remediation works carried out and any significant variations from the works set down in the approved remediation statement;
- (ii) Include and discuss substantiating data (analytical or otherwise), and
- (iii) Confirm that the remediation objectives set down in the remediation statement have been achieved.

Reason: To enable the Local Planning Authority to determine whether the site has been made 'suitable for use' and that contamination has been dealt with so as not to present any significant environmental risks.