



STRATEGIC PLANNING COMMITTEE

Monday 14 December 2020

JUDICIAL CHALLENGES OF PLANNING DECISIONS – REVIEW AND LESSONS LEARNT

EXECUTIVE SUMMARY

1. The Council has successfully defended four legal challenges during 2020 against planning decisions the Council has made. Whilst this is excellent news, and testimony to the detailed consideration of all material planning issues in making those planning decisions this report assesses whether there are any lessons to be learnt from the process to improve further the decision making procedures.
2. The Strategic Planning Committee is asked to note the content of the report.

Is the report Open or Exempt?	Open
Wards Affected:	All
Cabinet Member:	Councillor David Ritchie, Cabinet Member with responsibility for Planning and Coastal Management
Supporting Officer:	Philip Ridley Head of Planning and Coastal Management 01394 444432 Philip.Ridley@eastsoffolk.gov.uk

1. INTRODUCTION

- 1.1 East Suffolk Council has successfully defended four legal challenges against decisions the council, as Local Planning Authority, has made in recent months.
- 1.2 The four challenges were against the following decisions.
 - DC/19/1022/FUL – Creation of a Lake for recreation purposes at Bawdsey Manor – considered by Planning Committee South and permission issued 21st November 2019
 - DC/19/1637/FUL – Relocation of Sizewell B Power Station facilities – considered by the Strategic Planning Committee and permission issued on 13th November 2019
 - DC/19/2641/FUL – Redevelopment of former council offices at Melton Hill, Woodbridge – considered by the Planning Committee South and permission issued on 29th November 2019
 - DC/19/5049/FUL- New Club House and associated works, including the erection of 5 dwellings for Felixstowe Ferry Golf Club – considered by the Planning Committee South and permission issued on 29th May 2020
- 1.3 The Court’s Judgments can be found at Appendix A.
- 1.4 Whilst applicants who submit a planning application have a right to appeal against a refusal of planning consent to the Planning Inspectorate, the results of which are reported to this Committee at each meeting, there are no third-party rights of appeal through the planning system against a decision of a local planning authority.
- 1.5 However, third parties can challenge the lawfulness of a planning decision via Judicial Review through the Courts. This is dealt with by the Administrative Court and can review the lawfulness of a decision, action or failure to act in relation to the exercise of a public function - in this case, a planning decision. If permission is granted to proceed, the Judicial Review will be decided by a judge at the High Court.
- 1.6 The procedures for making a challenge are set out in the Civil Procedure Rules. An application for Judicial Review of a planning decision must be made within six weeks of the planning decision being made (that is the date of issuing the permission and not the date of the Planning Committee meeting). Leave to proceed with a Judicial Review will not be granted by the Court unless there is evidence that a potentially arguable legal mistake may have been made. This could include where the local authority failed to fully set out and consider differing opinions or the procedures in dealing with the application were flawed.
- 1.7 A Judicial Review will not be allowed to proceed if it is based solely on a difference of opinion on the outcome of the application.
- 1.8 The submission of a potential Judicial Review is thankfully not a regular occurrence and so to receive four in a short period supported a review when concluded. Given the short timescales for responding to challenges and the specialist nature of the matters to be considered the Head of Planning and Coastal Management and the Head of Legal and Democratic Services work together and engage the services of specialist legal counsel to advise and draft responses and for any subsequent submissions to the Court if a challenge is made and subsequently allowed to proceed.
- 1.9 If the legal review is indicating that the prospects of successfully defending a challenge are low it can be agreed that we consent to quash the original planning decision. If that does

occur, or a legal challenge subsequently is found against the council, then the planning application becomes “live” again and the Council will need to be redetermine it, and in the process ensure that any procedural or other errors previously identified have been rectified. Therefore, it does not follow that a successful legal challenge results in stopping the development that was originally consented.

- 1.10 In the four cases considered this year only the Felixstowe Ferry Golf Club case didn’t proceed to a Court hearing, but was dismissed “on the papers” and the Claimant did not seek an oral hearing to challenge that decision. The Sizewell B case was granted leave to challenge the decision but only on one of their original grounds and they subsequently sought to challenge this outcome in the Court of Appeal. The Court of Appeal subsequently allowed the Claimant’s challenge, and the grounds of challenge were rectified accordingly.
- 1.11 The Claimant in the Sizewell B case sought to challenge the decision of the High Court to dismiss the case in the Court of Appeal, but this was recently dismissed. In the other two cases the Claimant accepted the High Courts ruling.

2. KEY LESSONS FROM THE FOUR CASES

- 2.1 This report is to look at the procedural issues to be considered from these cases and not the planning issues raised in the cases themselves. Officers will be able to answer questions on the actual cases if Members wish to raise any points.
- 2.2 The procedures for determining planning applications, and the roles of Officers and Members at East Suffolk Council are set out in the Constitution and in particular in the Code of Good Practice/Guidance for Members - Planning and Rights of Way. These were reconsidered when East Suffolk Council was formed in 2019 and are considered sound in setting out how procedures are undertaken and what is expected of Officers and Members, in their roles, in the process. Having regard to the Code of Practice a review of these four legal challenges provide reassurance that the decision making processes of the council on planning matters is robust.
- 2.3 Three of the cases were the subject of Court hearings, which in addition to the council having legal counsel in attendance, were also attended by the relevant officers, but were also observed by Cllr Ritchie and several other members of the Strategic Planning Committee as they were held remotely.
- 2.4 In each of the cases it will be noted that the Court, and all parties responding to the cases go in to incredible forensic detail, both in their written submissions, and in the Court hearing itself, in order to make or rebut points being made. However, to provide reassurance to this Committee it is generally accepted that the Court “must keep in mind that the function of planning decision-making has been assigned by Parliament, not to judges, but at a local level to elected councillors with the benefit of advice given to them by planning officers, most of whom are professional planners, and on appeal, to the Secretary of State and his inspectors.”
- 2.5 It is also accepted that Planning Officers' reports to committee are not to be read with undue rigour, but with reasonable benevolence, and bearing in mind that they are written for councillors with local knowledge. Unless there is evidence to suggest otherwise, it may reasonably be assumed that, if the members followed the officer's recommendation, they did so on the basis of the advice that the officer gave. Alternatively, if a decision is made contrary to officer advice clear planning reasons must

be set out to establish the reason for the alternative decision. This audit will be made clear in the Minutes.

- 2.6 It will be noted in reviewing each of the Judgements the Officer Report, as set out above, was scrutinised in significant detail alongside the Minutes of each meeting to establish the chronology of events leading to the eventual decision. This included the information provided by Public Speakers and the response to any questions raised of both speakers, Members and Officers. In the Bawdsey Manor case there was also significant scrutiny of the Update Sheet, provided to Members in accordance with the Code of Practice, the day before the meeting. It was reviewed in detail and it correctly included all subsequent information received post the publication of the Committee report. In the Felixstowe Ferry case, their claim also included a detailed review of the filming of the actual Committee meeting, that is publicly available on YouTube, to prepare their challenge. Members should therefore be aware of, but not concerned by, the scrutiny decisions are put under but be satisfied that procedures adopted, and advice provided by Officers is sound.
- 2.7 Therefore, having regard to the Code of Practice/Guidance for Members – Planning and Rights of Way and the conclusions to be drawn from these decisions that first and foremost, we need to ensure we have well trained professional officers providing sound and lawful advice to the Planning Committees. This includes not just Planners but the whole range of allied professions from across the Council. This also includes the advice we receive from other statutory consultees such as the Highway Authority. East Suffolk Council has a strong and experienced team and all reports to Planning Committee are reviewed in detail by senior officers to provide that quality assurance check and assessment. In assessing these reports part of the review is to assess the potential risk for possible judicial challenge especially in the more controversial cases. There is also a strong training and development culture in the council to “grow our own” as part of good succession planning.
- 2.8 The need for well-resourced planning teams was a matter that the Council responded to in its response to the recent consultation on the Planning White Paper. However, if it is considered that additional input is required and that is not available in the Council, we will bring that expertise in on a consultancy basis as required (recent examples include the need for Viability advice).
- 2.9 It will also be noted in the Bawdsey Manor case there was a difference of opinion on noise matters between officers but the Judge properly concluded that the Planning Officer was entitled to come to a different view in drafting the report on the application when balancing all the other material planning issues needing to be considered. This is a key point to note as with most, if not all, planning applications there will be differences of opinion that have to be properly balanced in order to make a sound recommendation and subsequent decision.
- 2.10 It will also be noted in that case that the Judge also referred to the fact that the Planning Committee had undertaken a site visit to fully understand the circumstances on the ground. This was an important point in confirming to him that the decision made was sound and that the Planning Committee had understood the noise issues in detail to balance the competing views. Therefore, alongside the recruitment and training of Officers there needs to be ongoing training and briefing of Councillors on Planning Matters in accordance with our Member Training Programme. This is in place but is

under regular review and is a matter that the Head of Planning and Coastal Management will discuss with the Cabinet Member and Chairs of the Planning Committees.

- 2.11 Reports to Planning Committee, especially for the more contentious cases are often long. It will be noted that at least one Claimant cited that the report's contents mislead the committee by not including the full transcript of a response. Whilst this was rightly rebutted it is a matter, that having reviewed further, we need to be mindful of. It is considered that the current process in drafting reports is appropriate but there may be occasions where it is important to attach the full (and often long) response from key consultees as an appendix to the report to enable Members to read those details in full to provide the full context. This occurred in the Melton Hill case with the response from the Senior Design and Conservation Officer provided as an appendix. It should also be noted that all the responses are available to view on line and the links are provided in the Committee reports.
- 2.12 Another key learning point is the need to have quality Minutes provided after each meeting. Again, whilst the Minutes are often long their drafting has significantly helped in rebutting these challenges. The Minutes set out the detailed chronology to make clear how the decision made was arrived at. This will be further aided by the recording of Committee meetings. This is currently taking place, due to Covid 19 reasons, with meetings presented and available to view on YouTube. The recording of meetings, and the ability to join/view a meeting remotely, is likely to continue and become the norm. This further emphasises the need for appropriate training for Officers and Members, including on presentation techniques in meetings to ensure that the meetings are conducted to the highest standards to provide that further confidence.
- 2.13 In the Bawdsey Manor case, as set out above, there was some discussion regarding the Update Sheet provided to Committee Members the day before the actual meeting. As background, reports to Planning Committee are generally written at least two weeks ahead of the actual meeting to ensure their publication to the agreed timescales. In many instances there are material changes to the application, and/or additional information is provided, or responses received, between drafting and the meeting. These need to be reported and our procedures in the Code of Good Practice/Guidance for Members - Planning and Rights of Way in the Constitution at para 6.3 states that anything provided at least 24 hours ahead of the meeting will be reported to Members. Sometimes the level of additional information to report is significant and always the option is available to potentially defer a case until the next meeting. That is a judgement call and officers will advise but Members may also consider that a deferral is necessary. However, if the case is heard the Committee Members need to be satisfied that they have understood the content of all additional information provided. The Committee Chairman may decide to have a short adjournment to enable Members to read any late submissions.
- 2.14 Notwithstanding the commentary in the case regarding the Update Sheet it is considered that the process must be in place given the nature of the procedural timings and the need to make timely planning decisions. It works well and it will be for the Chairman at each meeting, in discussion with Officers to seek confirmation that Members have read the Update Sheet and to ask whether there are any matter arising from them.
- 2.15 Public Speaking procedures at Planning Committee are set out in the Code of Practice and the process allows speakers to be questioned, in addition to Members being also able to ask Officers questions. These legal cases confirm the benefit of having this

process in place and that we have a sound and robust process that enables the salient points to be heard and differing opinions understood by the Committee.

- 2.16 In concluding, Members should be satisfied that the procedures adopted through the Code of Practice provide a strong framework for determining planning applications. Additionally, having an on going training programme in place for both Members and Officers is also crucial to ensure we have the best trained representatives in providing advice and making decisions. East Suffolk can be rightly pleased with the outcomes of these decisions but must be always vigilant in determining any application as the process is always open to detailed scrutiny.

3. FINANCIAL AND GOVERNANCE IMPLICATIONS

- 3.1 It is accepted and understood that planning decisions should be open to proper and full scrutiny. This provides the reassurance to the public of a sound and thorough set of procedures and therefore outcomes. This helps with public confidence in what is often seen as a controversial area of local government.
- 3.2 The general principles of legal challenges on planning decisions are that the loser pays the costs of the other party. However in these type of environmental cases costs are capped such that the Council would be liable to pay a maximum of £35k per case to the Claimant if it lost a case, but the Claimant would be limited to £5k per case, if the case is made by an individual, or £10k on behalf of a group. If a case is dismissed before proceeding to Court reasonable costs are recharged. It should be noted therefore if the Council were to lose it would pay £35k in costs to the Claimant plus our own legal costs as well as significant officer time.
- 3.3 In these cases the Council recovered/is in the process of recovering £10k for the Sizewell B case, £5k for each of Bawdsey Manor and Melton Hill and has recovered £1600 for the Felixstowe Ferry case. The council incurred costs well exceeding the funds recovered. The cumulative fees for counsel for all three cases that went to court are in excess of £70k and there will be significant additional costs of officer time. This is a significant cost differential for the council to bear but Members should be reassured that notwithstanding there were four challenges through 2020 the rigour and assessment by the council in making planning decisions minimises these risks.

4. REASON FOR RECOMMENDATION

- 4.1 Strategic Planning Committee are required to be fully informed of the planning functions and processes of the Council and this report has been provided to update them on these important legal matters.

RECOMMENDATION

That Strategic Planning Committee note the contents of this report and that the matters raised in section 2, following dialogue with the Cabinet Member and Planning Committee Chairman, will be incorporated in to the training plans for Officers and Members to ensure the Council continues to make sound planning decisions.

APPENDIX A

1	Sizewell B
2	Sizewell B
3	Bawdsey Manor
4	Melton Hill
5	Felixstowe Ferry Golf Club

BACKGROUND PAPERS

DC/19/1022/FUL – Creation of a Lake for recreation purposes at Bawdsey Manor, Bawdsey

DC/19/1637/FUL – Relocation of Sizewell B Power Station facilities, Sizewell, Leiston-cum-Sizewell

DC/19/2641/FUL – Redevelopment of former council offices at Melton Hill, Woodbridge

DC/19/5049/FUL – New Club House and associated works, including the erection of 5 dwellings for Felixstowe Ferry Golf Club, Cliff Road, Felixstowe

All can be found on the Council's website at <https://www.eastsuffolk.gov.uk/planning/planning-applications/publicaccess/>