



REPORT TO:	EXTRAORDINARY COUNCIL MEETING
DATE:	21 OCTOBER 2013
REPORT OF THE:	COUNCIL SOLICITOR AND MONITORING OFFICER ANTHONY WINSHIP
TITLE OF REPORT:	MONITORING OFFICER'S REPORT UNDER SECTION 5 OF THE LOCAL GOVERNMENT AND HOUSING ACT 1989
WARDS AFFECTED:	ALL

1.0 PURPOSE OF REPORT

- 1.1 Members of Council are asked to consider this Monitoring Officer's report in relation to the following Motion on Notice which is on the agenda for the Council meeting on 21 October 2013:

"The five Members below wish to call an Extraordinary Full Council preferably in Kirbymoorside. This Council to debate the Gladman application at Kirbymoorside (13/00342/MOUT).

We wish to consider the decision taken on the 28 August 2013. As a result the Council resolves to approve the following:

- (i) Instruct the Chief Executive to proceed with revocation of the decision; and*
- (ii) To not contest the Judicial Review that is expected on this planning application."*

- 1.2 This report is prepared on the assumption that the above motion seeks in part to invite the District Council to revoke a planning permission which may be the subject of Judicial Review proceedings the remedy for which, in appropriate circumstances, can be the quashing of the planning permission. Any claimant has six weeks from Friday, 30 August 2013 to lodge an application for Judicial Review. This time period expires on Friday, 11 October 2013.

- 1.3 As the Monitoring Officer for Ryedale District Council, I have a duty to make a report under Section 5 of the Local Government and Housing Act 1989 on any proposal, decision or omission by the Authority, or a Committee which has given rise to, or is likely or would give rise to:-

- (1) A contravention of law or any Code of Practice made or approved by or under any enactment; or
- (2) Such maladministration or failure as is mentioned in Pt III of the Local Government Act 1974, ie in connection with action taken by or on behalf of the Authority, in the exercise of the Authority's administrative functions.

1.4 This requirement is referred to in the Council's Constitution: Part 2 Articles of the Constitution, Section 11.4 functions of the Monitoring Officer – Ensuring lawfulness and fairness of decision making (page 30).

1.5 Under Section 5(5) of the same Act the authority shall consider the report. In this case the meeting is the Extraordinary Council meeting to be held on 21 October 2013.

2.0 RECOMMENDATIONS

2.1 It is recommended that:

- (i) This report be received; and
- (ii) Council considers the advice in this report before deciding whether or not to pass the motion set out in paragraph 1.1 to be considered by Council on the 21 October 2013;
- (iii) Council does not seek to revoke the planning permission dated 30 August 2013 for major residential development of Kirkdale Road, Kirkbymoorside, North Yorkshire.

3.0 RECOMMENDED REASONS FOR DECISION

3.1 It is considered that a decision to initiate procedures to revoke the planning permission for residential development at Kirkdale Road, Kirkbymoorside, North Yorkshire would not be regarded as reasonable and lawful in all the circumstances and would, therefore, be a potentially irrational decision which in itself could be subject to Judicial Review.

4.0 ALTERNATIVE OPTIONS CONSIDERED AND RECOMMENDED FOR REJECTION

4.1 Council Officers have explored what the Council's options are. In arriving at the advice in this report, I have sought specialist legal advice from an experienced planning law barrister from Cornerstone Chambers in London. The potential options are revocation of the planning permission and something called Self Judicial Review where in exceptional cases the Leader of the Council can apply for Judicial Review to quash the Council's decision.

4.2 The Council could revoke the planning permission under Section 97 Town and Country Planning Act 1990. This would give the applicant the right to compensation from public funds, based on the difference in the value of their land with and without the planning permission. That would be a windfall profit for the owners, who purchased the land without the benefit of the planning permission. The cost of the compensation would be met from the public purse. It is unlikely that the Council will be able to persuade the Secretary of State that it is expedient to revoke the permission, if any revocation is opposed. In deciding whether to revoke the Council

will take into account the compensation that would be due, estimated at between £3 and £5 million. However this level of compensation could be substantially higher depending on valuation issues being resolved. Planning permission could subsequently be granted for the same major residential development because the only professional planning opinion available indicates that the residential development is in accord with the National Planning Policy Framework and the Development Plan. Accordingly, in terms of preventing residential development, revocation would serve no useful purpose.

- 4.3 If the Council were to judicially review their own permission, even if the Court found that there was a technical error of law on the vote it would be unlikely to exercise its discretion to actually quash the decision. Accordingly this course of action is not recommended.

5.0 BACKGROUND

- 5.1 The key events that have occurred which is the context for the Motion on Notice referred to above are outlined in the attached **Annex 1**. A copy of the approved minutes of the Planning Committee meeting held on 28 August 2013 are also attached as **Annex 2**.

- 5.2 By way of background, Members are advised that four key matters that need to be considered by a Council exercising the legal powers of a local planning authority are as follows:

- (i) Planning powers should by law be exercised for a public purpose;
- (ii) Members of a Planning Committee are required to keep an open mind until they have all the information before proceeding to a decision and should not predetermine planning applications;
- (iii) Strong local opposition to a proposal is not of itself a basis for refusal unless based on proper planning grounds;
- (iv) Fiduciary duties of individual Members.

Each of these issues will be considered in turn.

Planning powers should by law be exercised for a public purpose

- 5.3 Members are advised that the House of Lords acting in a judicial capacity in *McGill v Porter* [2001] held that the exercise of statutory powers by a Council for party political advantage is unlawful. Lord Bingham of Cornhill observed in that case that:

“a public power is not exercised lawfully if it is exercised not for a public purpose for which the power was conferred but in order to promote the electoral advantage of a political party”.

Members of a Planning Committee are required to keep an open mind

- 5.4 Clearly in the context of determining planning applications, the public purpose is served by making decisions in accordance with the policies of the development plan unless material considerations indicate otherwise. If a Member adopted an approach of favouring or opposing planning applications of a certain type, allowing irrelevant matters to outweigh important planning considerations, giving undue weight to the opinion of the planning applicant or objectors and not giving due weight in the decision making process to professional opinion from Officers and/or failing to give

clear and convincing planning reasons for approving or refusing a planning application contrary to such advice and/or contrary to the policies of the development plan and the National Planning Policy Framework, then questions may be raised as to whether a Member is properly discharging the role of a Planning Committee Member and or has pre-determined the planning application. The Ombudsman is also likely to find this behaviour to be maladministration.

- 5.5 The objection to predetermination has been ably described by Mr Justice Ouseley in the High Court case of Bovis Homes (2002) as follows:-

"The further vice of predetermination is that the very process of democratic decision making, weighing and balancing relevant factors and taking account of any other viewpoints, which may justify a different balance, is evaded. Even if all the considerations have passed through the predetermined mind, the weighing and balancing of them will not have been undertaken in the manner required. Additionally, where a view has been predetermined, the reasons given may support that view without actually being the true reasons. The decision-making process will not then have proceeded from reasoning to decision, but in the reverse order. In those circumstances, the reasons given would not be true reasons but a sham".

- 5.6 It is important for Members to keep an open mind until they have all the information before proceeding to a decision. Guidance on the proper approach to the decision making process is contained in the Planning Code of Practice.

Strong local opposition to a proposal is not of itself a basis for refusal unless based on proper planning grounds.

- 5.7 It is clear in this case that the strength of local opposition to the proposal has been great but that, unless based on proper planning grounds, cannot be a basis for refusal. Costs Circular 03/2009 is clear:

B21. "While planning authorities are expected to consider the views of local residents when determining a planning application, the extent of local opposition is not, in itself, a reasonable ground for resisting development. To carry significant weight, opposition should be founded on valid planning reasons which are supported by substantial evidence."

B22. "Planning authorities will be at risk of an award of costs for unsubstantiated objections where they include valid reasons for refusal but rely almost exclusively on local opposition from third parties, through representations and attendance at an inquiry or hearing, to support the decision."

Where Planning Committees fail to have regard to this national policy guidance when making planning decisions and an appeal is lodged, it is almost certain that the Council will be punished by an adverse costs award.

Fiduciary duties of individual Members

- 5.8 In considering the motion on notice Members are asked to have in mind the following considerations:-

- (i) Local authorities owe a fiduciary duty to their ratepayers, analogous to that owed by trustees to their beneficiaries.

It has been stated in relevant case law that “the Council must preserve a balance between the duty owed to that general body of ratepayers and the duty owed to [others]”.

Accordingly, in deciding to spend money, a local authority must take account of the interests of the council taxpayers who have contributed to the authority’s income and balance those interests against those who benefit from the expenditure. A failure to take account of the interests of the council taxpayer may constitute a failure to have regard to a relevant consideration; the way in which the balance is struck may be challenged on the ground of irrationality.

- (ii) Members are advised that this fiduciary duty is personal to each Member. If a decision of the Council is scrutinised by the High Court, or by the External Auditor it is no defence that a Member felt obliged to vote in a particular way out of loyalty to a Ward Member or a political group.

6.0 REPORT

6.1 Independent specialist legal advice from an experienced planning barrister of Cornerstone Chambers in London and Sharpe Pritchard LLP Solicitors of London has been sought in relation to the grant of planning permission dated 30 August 2013 for major residential development of Kirkdale Road, Kirkbymoorside, North Yorkshire.

6.2 Council Officers have explored what the Council’s options are. These are revocation of the planning permission and something called Self Judicial Review where in exceptional cases the Leader of the Council can apply for Judicial Review to quash the Council’s decision.

6.3 In relation to revocation the District Council’s barrister has reached the following conclusion:-

“It is unlikely that the Council will be able to persuade the Secretary of State that it is expedient to revoke the permission, if any revocation is opposed. In deciding whether to revoke the Council will take into account the compensation that would be due, estimated at between £3 and £5 million.”

6.4 With regard to the second option, there are two hurdles to obtaining a Judicial Review. Firstly there must be a legal/procedural error of law. Secondly the Judge must consider it reasonable having regard to all the relevant circumstances to exercise his or her discretion to quash the planning permission. In relation to self Judicial Review the barrister has reached the following conclusions:

- (a) If the Council were to judicially review their own permission, even if the Court found that there was a technical error of law on the vote it would be unlikely to exercise its discretion to actually quash the decision.
- (b) On the issue of the exercise of the Court’s discretion in a Judicial Review application the barrister reached the conclusion that the Court would not quash the planning permission for the following reasons:-
 - a. The planning merits, as accepted by the Council in their June meeting, appear to be in favour of grant. No reasons of sufficient weight in planning terms have been put forward explaining why the Council should depart from their June decision and consider

that there is an in principle objection to development at the site. Therefore, at this stage, there do not appear to be any defensible planning reasons in favour of refusal.

- b. The developer would be strongly prejudiced by the decision being quashed. It appears to be accepted that had this decision been refused he would have been highly likely to succeed on his appeal against the first non-determination, not least because the Council had no outstanding objections to the scheme.
- c. Quashing would simply serve no purpose. Given that it appears the planning merits are reasonably clearly in one direction. If the decision is quashed either the Council would reasonably be expected to vote for the proposal next time or their refusal to do so would be overturned on appeal.

6.5 It is important to note that once a planning permission has been issued by the Council or an appeal by a Planning Inspector, the Local Planning Authority is *Functus Officio* and cannot, thereafter, make any correction or withdraw the planning permission. **Note: *Functus Officio* is Latin for “Having performed his or her function”. The Local Planning Authority has performed its task and its function has been exhausted.**

6.6 Against this background the only realistic way that the planning permission can be quashed is if a third party successfully pursues a Judicial Review action against the Council. Gladmans would clearly oppose any such legal action.

6.7 In the event of a third party commencing Judicial Review proceedings it is considered that as the prejudice in quashing the planning permission would be to the developer, it is most appropriate that Gladmans take the lead in defending any such legal action and explaining the prejudice to the Court.

IS THERE LIKELY TO BE ANY ILLEGALITY OR MALADMINISTRATION FOR THE PURPOSE OF SECTION 5 OF THE LOCAL GOVERNMENT & HOUSING ACT 1989?

6.8 Having carefully considered the contents of the report of the section 151 Officer and having regard to the Council’s statutory obligations and procedures, I have decided to exercise my powers as the Council’s Monitoring Officer under Section 5 of the Local Government & Housing Act 1989 to prepare a report with respect to the Extra ordinary Council meeting considering the adoption of the resolution to incur substantial expenditure to revoke the planning permission dated 30 August 2013 for major residential development on land near Kirkdale Road, Kirkbymoorside, North Yorkshire.

6.9 Three considerations which arise in this case are:-

- (i) No recognised harm has arisen even if there was a technical error in the vote. The only available professional planning opinion is that there is no material planning objection to the proposed residential development;
- (ii) In the absence of any material planning objection to the existing location of the proposed residential development, there is no recognised benefit justifying the Council incurring expenditure estimated at £3-5 million to revoke the planning permission;

- (iii) A justification for the expenditure put forward is that it restores the trust and confidence of the local community in the Council. However this proposal has no regard to considerations of recognised harm or benefit. Even if it was found that a technical error was made in the voting at the Planning Committee, the making of such an error does not automatically give rise to a legal obligation on the Council to incur substantial expenditure in remedying the perceived consequences of that error in the eyes of objectors. Considerations of recognised harm are relevant.

6.10 Although this is the view that I take as Monitoring Officer for the Council only the Courts can give a definitive interpretation.

7.0 OPTIONS

7.1 The only legal mechanisms for extinguishing a planning permission are as follows:-

- (i) Revocation
- (ii) Judicial Review seeking to have the grant of outline planning permission quashed.

7.2 Each of the above theoretical options will be considered below.

8.0 REVOCATION

8.1 The Council has a power under Section 97 of the Town and Country Planning Act to revoke the planning permission. The Local Planning Authority can do this if they think it is expedient to do so, having taken into account the Development Plan and all the material considerations.

8.2 If the Council revokes the planning permission the Council becomes liable for compensation to cover the applicant's aborted expenditure, and compensation for any other loss directly attributable to the revocation. This means that the Council would be liable to pay the owners of the land the difference between the value of their land with and without the planning permission.

8.3 An Order under Section 97 of the Town and Country Planning Act 1990 would either have to be made with the applicant's consent, or would have to be confirmed by the Secretary of State. If the Order is not by agreement, then there is likely to be a public inquiry into whether the Order should be made. But even if the Order is made with the consent of the applicants, it must still be advertised publicly. Persons affected by the Order then have a specified period within which to give the Secretary of State notice that they want a public inquiry.

8.4 In the case of *The Health and Safety Executive (Appellant) v Wolverhampton City Council (Respondent)* [2012], the Supreme Court ruled that when local planning authorities are deciding whether or not to revoke or modify a planning permission they are entitled to take into account the compensation they could have to pay.

8.5 The Secretary of State also has the power to revoke the planning permission himself, at the Council's expense. This power is rarely used. The Minister of Planning made a statement to the House of Commons in December 1989 in relation to which he said that:

“the powers should be used only if the original decision is judged to be grossly wrong, so that damage is likely to be done to the wider public interest ... He may well be prepared to exercise his power to revoke a planning permission where he considers that consistency is needed between the Local Planning Authority’s decision in different cases, in order to ensure that similar circumstances give rise to similar decisions and that the provisions of the Development Plan, so far as it is material, and other material considerations have been taken into account. My Right Honourable Friend wishes to remind Planning Authorities of the importance of behaving equitably as between applicants, and being seen to do so. Where applicants for similar permissions in similar circumstances have been treated differently, it can seem capricious and unfair. Although there is a place in the planning system for consideration of personal circumstances, my Right Honourable Friend thinks that these have to be very marked indeed to justify treating similar applications differently. He also wishes to remind all Members of Planning Committees that their decisions should be governed by material planning considerations alone. They should be most careful to avoid even the appearance that they may have been influenced by immaterial considerations”.

- 8.6 As already mentioned above, it is unlikely that the Council will be able to persuade the Secretary of State that it is expedient to revoke the permission, if any revocation is opposed. In deciding whether to revoke the Council will take into account the compensation that would be due, estimated at between £3 and £5 million.

9.0 JUDICIAL REVIEW

- 9.1 Judicial Review is a process by which the High Court reviews the legality of decisions made by public bodies. The Court is concerned with whether the decision was within the public authority’s powers, and whether the procedure was correct. The Court does not try to make the decision itself. If an application for Judicial Review succeeds, the result is usually that the decision is cancelled (“quashed”), and the public authority is required to make it again.
- 9.2 The Council cannot itself apply to have its own decision judicially reviewed, but it is possible for an elected Member to apply, if they have relevant responsibilities within the Council. The application would then be made by that Member, but interested third parties could, if they wished, take part in the proceedings.
- 9.3 There are three types of reason for seeking review of a decision, which in practice tend to overlap.
- (a) **Illegality:** The Council's powers come from statute, and can only be exercised lawfully within the limits that the statute imposes. Consequently, if a decision has clearly been made for the wrong purpose, with an improper motive or in bad faith, the decision is outside the Council’s powers.
 - (b) **Irrationality:** The decision must take the relevant considerations into account, and must not give weight to irrelevant issues. It must be possible to understand how the Council could reach the decision they did reach, on the basis of the relevant considerations, without reference to any irrelevant considerations.
 - (c) **Procedural Irregularity:** If the Council does not comply with its own procedures, the decision may be invalid. In particular, the decision must be

reached fairly, without bias or the appearance of bias.

- 9.4 As already mentioned above, if the Council were to judicially review their own permission, even if the Court found that there was a technical error of law on the vote it would be unlikely to exercise its discretion to actually quash the decision.

10.0 CONCLUSION

- 10.1 Having carefully considered, in my capacity as the District Council's Monitoring Officer, all the relevant considerations in this case, including specialist legal advice, I have concluded that it is highly unlikely that a decision to initiate procedures to revoke the planning permission for residential development at Kirkdale Road, Kirkbymoorside, North Yorkshire would be regarded as reasonable and lawful in all the circumstances and would, therefore, be a potentially irrational decision which in itself could be subject to Judicial Review.

Anthony Winship Council Solicitor and Monitoring Officer

Author: Anthony Winship, Council Solicitor and Monitoring Officer
Telephone No: 01653 600666 Ext: 267
E-Mail Address: anthony.winship@ryedale.gov.uk

Background Papers:

Revocation of planning permission – House of Commons Library Standard Note published 22 May 2013

STATEMENT ON GLADMAN'S PLANNING APPLICATION FOR RESIDENTIAL DEVELOPMENT AT KIRKDALE ROAD, KIRKBYMOORSIDE

Gladmans have submitted two planning applications for residential development at Kirkdale Road, Kirkbymoorside. Gladmans submitted a non determination appeal on the first planning application before they had resolved outstanding matters on issues like affordable housing and the Inquiry date was 3 September 2013. The Planning Committee meeting on Wednesday, 28 August 2013 made a decision on the second Gladman's planning application. Gladmans indicated they would withdraw the appeal if the second planning application was approved at the Planning Committee.

The report of the Head of Planning and Housing to the Planning Committee meeting on 28 August 2013 included a recommendation of approval of Gladman's second planning application. The report considered all the relevant material planning considerations including local objections to the scheme, the presumption in favour of sustainable development in the National Planning Policy Framework and the fact that 74 affordable homes would be delivered by approving the scheme.

Taking all the material considerations into account the professional planning view was that the planning balance favoured a recommendation of approval. The professional planning opinion of the Head of Planning and Housing in relation to the interpretation of emerging Local Plan policy was supported by written advice from an experienced Planning Law Barrister, Mr David Manley QC of Kings Chambers, Manchester.

After considerable debate by Members on the planning application, a vote was taken on the application at the Planning Committee using the electronic voting system. Two Members voted for the proposal to be refused and two Members voted against the proposal. There were six abstentions. The Chairman used his casting vote to break the deadlock. Accordingly, the proposal to refuse was not carried. The Chairman declared the result as one of approval.

The Planning Committee have used the electronic voting system for more than two years. Members of the Committee have received training in using the system. There have been no recorded difficulties in using the electronic voting system and Members have much experience in using the system.

There have been subsequent reports after the Planning Committee meeting that a Member made a voting error when using the electronic voting system. However, the Member concerned did not express that view before the Chairman declared the result at the Planning Committee meeting on Wednesday, 28 August 2013.

Against this background the planning permission was signed on Friday, 30 August 2013 after completion of the planning obligation.

One Member has asked if the planning permission can be withdrawn. There are only two legal ways that the planning permission could be extinguished. These are:

- (i) Firstly by a Revocation Order made by the Council. This would give rise to compensation which in this case could potentially run into millions of pounds;

- (ii) Secondly by an application for judicial review (JR) by a third party if it was believed there was a legal flaw in the Planning Committees decision making process. JR is a process for challenging the lawfulness of decisions. A JR does not revisit the merits or seek to substitute a planning decision. Such applications have to be made promptly and within six weeks from the date the grounds for challenge arise. There are no compensation implications for the Council as there are in (i) above.

It should be noted that Gladmans had a non-determination appeal in relation to the first planning application. The Inquiry start date was planned for Tuesday, 3 September 2013. The District Council's Planning Committee meeting on 4 June 2013 agreed the four notional reasons for refusal as being inadequate information on:-

- (i) Affordable housing
- (ii) Education contributions
- (iii) Archaeology
- (iv) Landscaping

All the above four reasons for refusal had been resolved by Friday, 30 August 2013. Accordingly there were no grounds on which the District Council could oppose the appeal proposals based on the first planning application.

Because the planning permission had been issued for the second planning application on Friday, 30 August 2013 Gladmans withdrew the non determination appeal on the same day. The Planning Inspectorate cancelled the Inquiry on Monday, 2 September 2013.

It should also be noted that the Planning Committee meeting on 4 June 2013 raised no fundamental objection in principle to the first planning application submitted by Gladmans. Officers at the Committee stressed to Members that the principle of the development was not considered to be at odds with National Policy or locally adopted and emerging Plan policies. Against that background it was highly likely that the Inspector would have allowed the appeal.