

REPORT TO: PLANNING COMMITTEE

COMMITTEE DATE: 19 March 2019

REPORTING OFFICERS: Gary Housden, Head of Planning, Anthony Winship, Head of Legal Services

SUBJECT: Planning Appeal against planning application 17/01249/FUL

APPLICANT: BP Forward Planning

PROPOSAL: Erection of petrol filling station with forecourt shop sales building, canopy, car parking, 3no. fuel pumps, below ground offset fills, air/water bay, trolley compound, goods in delivery bay, bin storage, site floodlighting and ancillary arrangements to forecourt and boundary.

LOCATION: 5 Welham Road Norton Malton North Yorkshire

1.0 PURPOSE OF REPORT

To request that Members of the Planning Committee authorise Officers of an appropriate course of action in relation to defending a current planning appeal in respect of the refusal of planning application 17/01249/FUL dated 2nd August 2018.

An appeal has been made against planning application 17/01249/FUL for a petrol filling station and forecourt shop building, this report will explain why the planning application was refused planning permission and whether the two reasons for refusal are still reasonable. This planning application was refused planning permission for two limited reasons relating to the inadequate information submitted in relation to the retail and flood risk sequential tests. For sites such as the application site, that is not within a Town Centre location the retail sequential test aims to steer retail development to sites that are within the Town Centre, unless such sites are not available or suitable. Likewise the flood risk sequential test aims to steer development to sites of a lower risk of flooding, unless such sites are not available or suitable. For both tests, the Livestock Market Site (LMS) was considered preferable to the application site. When the application was considered by Planning Committee there was insufficient evidence submitted for Officers to conclude that the proposed development could not be located on the LMS. The applicant has now appealed against this decision, and included new information which addresses the two sequential tests and demonstrates why the LMS is not suitable for the proposed development. Consequently Officers, are now in possession of the information required to make the development acceptable in planning terms.

2.0 RECOMMENDATION

- (a) Members authorise officers not to contest the planning appeal for application 17/01249/FUL.

3.0 BACKGROUND

Members will recall at the Planning Committee meeting on 1st August 2018, they resolved to refuse planning permission at the above-mentioned site, (application number 17/01249/FUL). The Officer recommendation to refuse planning permission was accepted in full by Planning Committee, with the application refused permission planning permission, for the following two reasons:

'1 It has not been demonstrated through the submission of sufficient evidence that the Malton Livestock Site (Horsemarket Road, Malton) which is at a much lower risk of flooding (Flood Zone 1) and sequentially preferable in flood risk terms to the application site (Flood Zone 3 (a)) is not a suitable and appropriate site to accommodate the proposed development. Consequently the flood risk sequential test required by paragraph 158 of the National Planning Policy Framework 2018 and Policy SP17 of the Local Plan Strategy has not been met in respect of the application site. The approval of this application would result in a development being located in an area at a higher risk of flooding than is necessary. The proposed development is therefore contrary to the requirements of Policy SP17 of the Local Plan Strategy and contrary to paragraphs 155 and 158 of NPPF 2018.'

2 It has not been demonstrated through the submission of sufficient evidence that the retail sequential test has been met. The Malton Livestock Market (Horsemarket Road, Malton) is considered to be sequentially preferable to the application site in terms of it being regarded as a Town Centre site in the Published Sites Document 2018. No compelling arguments have been made as to demonstrate why the Malton Livestock Site is not suitable or available for the development proposed. Consequently the proposed development is contrary to the requirements of paragraph 86 of the National Planning Policy Framework 2018.'

Members will appreciate that both of these reasons for refusal related to a lack of information being submitted to justify that the application site as the most suitable site for the proposed development, in both retail and flood risk terms. At the time the original decision was made, using the sequential tests for both flood risk and retail, the development of the Livestock Market Site (LMS) for the proposed development was considered to be preferable, with inadequate information submitted to satisfy the sequential test.

The appellants have appealed against this decision and requested a Public Inquiry. With their appeal, the appellants have included new information, comprising:

- A Revised Flood Risk Sequential Test; and
- A Report Relating to an Appraisal for Potential Service Station Use at the LMS by Tim Hancock BSC FRICs MEI.

The appellants appeal form and appeal statement including the new information, along with the original Officer Report to Planning Committee are appended to this report for Members information.

On receipt of the appeal (and the new information) the Council obtained expert retail planning advice to advise on whether the new information submitted with the appeal has addressed the reasons for refusal. That advice (from Mr Gary Swarbrick, a planning consultant from ELG Planning Consultants) is also attached to this report for Members information.

Upon receipt of the advice from Mr Swarbrick, the Head of Legal Services arranged for a legal opinion from a QC on the appropriate options available to the Council. Officers used the same retail planning Consultant and QC for advice during the consideration of the planning application and upon receipt of this new information.

Officers have agreed with both the Planning Inspectorate and the appellant for additional time in order for Planning Committee to consider this new information. After which, Officers will notify the Planning Inspectorate with regards to how the LPA wishes to respond to this appeal.

The agent for the owners of the LMS have been appraised of this appeal and new information. They have also been advised that this issue will be reported to Planning Committee and invited to make any

further comments. Any comments received that they wish the Planning Committee to consider, will be appended to this report, included on the Late List or reported at the meeting.

An important procedural point for Members to note is that the Local Planning Authority can only consider whether the new information has addressed the stated reasons for refusal. It is not possible to introduce any new reasons for refusal or re-consider any other aspects of the scheme at this point.

4.0 REPORT

When Officers were considering the original planning application, repeated requests were made to the agents for additional information to demonstrate why the LMS was not suitable. The information that was submitted at the time and considered did not demonstrate the LMS was not suitable. The Planning Committee agreed and the application was refused.

The report by Mr Hancock (submitted with the appellants appeal) has examined in detail the suitability of the LMS. In particular, it has considered the following issues; location and access to traffic; existing competition; access and accessibility; site size; shape and levels; tenure, stability of the trading area; services; and extraordinary costs. The report concludes for all these reasons that the LMS is not suitable in his opinion for the proposed development. The report states that a petrol filling station requires initial investment of between £1.5m and £1.7m, and in order to make this commitment it is important for the applicant to have control over the land in order realise the investment made, typically a minimum 25 year period. The LMS would also only be available on a leasehold basis and not freehold. The report states that a petrol filling station such as that proposed requires a flow of vehicles of between 10,000 – 15,000 a day. The LMS has a vehicle flow of 3,726 per day. Members will note that the Officer report contained data for the application site of 53,130 weekly movements in January (approx. 7,585 daily movements at that time). It is also very clear from Mr Hancock's report that a petrol filling station needs to be located where it is visible to motorists. The LMS site is accessed by a series of secondary access roads. Officers are also mindful of the wider trend of locating petrol filling stations on busy road networks, as opposed to central town centre locations.

A revised Sequential Test in regard to flood risk has also been submitted and considers the LMS not to be suitable for the proposed development because of the site's configuration; its position on the strategic road network; the accessibility of the site; the inadequacy of the footpath network; proximity to Listed Buildings; and air quality. Whilst, Officers disagree with the heritage, air quality, and footpath network arguments put forward, the arguments relating to the site's accessibility and its impact upon the road network are considered to be significant factors. Furthermore, the arguments put forward by Mr Hancock are equally considered to apply to the both retail and flood risk sequential tests.

The report by Mr Swarbrick (attached) on behalf of RDC has considered the new information relating to the suitability of the LMS. Mr Swarbrick has stated:

'The proposals relate to the erection of a petrol filling station with an associated forecourt retail unit with a total GIA of 495 sq.m. In view of the nature and scale of the proposed retail unit and the associated level of car parking, we are of the opinion that it would not remain ancillary to the fuel sales element and would be a shopping destination in its own right. On this basis, we are of the opinion that the key retail policy tests would be applicable in this instance despite the contentions of the appellant. Moreover, we are satisfied that the Livestock Market Site should be regarded as a sequentially preferable location to the appeal site.'

However, ultimately, we are persuaded that the supplementary information prepared on behalf of the appellant satisfactorily demonstrates that the Livestock Market Site is not suitable to accommodate a petrol filling station development, primarily due to an insufficient volume of traffic

on the surrounding road network and its lack of visibility from the primary road network within Malton. We have also sought to question whether the redevelopment of part of the Livestock Market Site for a petrol filling station and forecourt retail unit would be consistent with the aspirations for this key development site and the overall strategy to provide improved shopping to ensure choice for food retailing and non-food shops, particularly fashion shops outlined within the adopted and emerging Local Plan documents and this is therefore a matter that Officers may wish to give further consideration.

On this basis, we would also accept that the Livestock Market Site is unsuitable in terms of the application of the flood risk sequential test. However, Officers should obviously satisfy themselves that there are no other suitable sites within Malton to accommodate the proposed development at lower risk of flooding than the appeal site.'

Based on the conclusions of Mr Swarbrick, Officers consider that to attempt to defend this appeal in light of this new information would be unreasonable and is likely to put the Council at serious risk of an award of costs. Officers have acted promptly to consider this new information and to obtain expert advice. It is anticipated, if Members agree to the recommendation of this report, that an award of costs can be avoided. The Legal Opinion Officers have obtained on the new evidence and the opinion of the Council's retail expert both strongly advises the Council not to contest this appeal.

If Planning Committee decides to contest this appeal, Members need to be aware of the potential risks associated with that course of action. The risks relate to the costs associated with trying to defend the appeal, and any associated award of costs against the Council for unreasonable behaviour. An award of costs can be made when a LPA pursues an appeal when there is little or no prospect of success. With the attached advice, Officers consider that there is little prospect of success defending this appeal. The LPA would also have to pay its own costs associated with the defending of this appeal. With this being a Public Inquiry, these costs are likely to be significant, including Counsel fees. Furthermore, Officers of the Council will be unable to undertake the appeal as to do so would be contrary to their professional view. If an external consultant could be found to undertake this work on behalf of the LPA there would be further costs associated with this commission.

This situation is unusual. Given the requests that were made by Officers to the appellants during the consideration of the planning application. It is most unfortunate that this new information was not submitted before the consideration of the planning application at the Planning Committee meeting on 1st August 2018. Nevertheless, the LPA is required to demonstrate that it has acted reasonably and responded to changing events such as this. Whilst this situation is regrettable Members are reminded that a decision on this appeal is required to be taken on the planning merits of the case and on the basis of the new information submitted with the appeal.

5.0 RECOMMENDATION

That Planning Committee authorise Officers not to contest the Appeal against the refusal planning permission reference 17/01249/FUL.