

Name of Committee	Full Council
Date	8th October 2013
Report Title	The Focus Review
Report of	The Focus Review Working Group

1. Background

A planning application allowing alterations to the building on the Focus Do-It-All site in Tavistock was granted in July 2011. Although the point does not seem to have been specifically considered, the application was granted on the basis of the conditions attached to the original permission would still apply to the new permission. Case law subsequently drawn to the Council's attention indicated that the conditions were not automatically attached opening up the possibility that the premises could be used for food retailing.

The next 9 months saw a protracted process involving the Planning and Legal departments and consultation of external legal parties in an attempt to resolve the situation. This concluded with a report to Full Council in April 2012 recommending legal proceedings. Following the production of the draft Retail Study, a further report was presented to Full Council in May 2012, again recommending the Judicial Review option. This was narrowly supported by the Council. Following the unsuccessful Judicial Review and consequent financial implications the Chief Executive presented a report to the April 2013 Full Council meeting recommending a Members' working group should be set up to identify what lessons could be learned from these proceedings. This proposal was accepted by the Council.

2. Working Group

The *Focus Review Working Group* was established with Cllrs Benson, Leech, Morse, Musgrave (Chair) and Sampson, being nominated by Group Leaders to serve on it. The Group was supported by the Chief Executive and the Member Services Manager working to the Terms of Reference as proposed in the Chief Executive's report and adopted by Full Council (CM89) outlined below.

- (i) Should officers have understood the implications of granting consent to divide the retail unit without requiring the re-imposition of conditions from the planning permission granted in 2007? If so, was the failure to understand the implications due to a matter of professional error or a system failure or some other cause;
- (ii) Why it took some 11 months after the grant of permission to make the application for Judicial Review and what, if anything should have been done to expedite matters;
- (iii) Why Members were not made fully aware of all the practical options available to them;
- (iv) The quality of the external legal advice received;
- (v) The involvement of elected Members before the matter was reported to Council in April 2012 and the role of local Ward Members in matters of this kind;

- (vi) Had the Council fully considered the planning merits of the permission when it was granted or when provided with Counsel's Opinion would it have drawn different conclusions on the impact of the potential food retail use.

The Working Group (WG) met on a near weekly basis through May and June. Members were provided with a substantial bundle of relevant legal papers and details of the extensive communications that took place between the various parties following the original planning application. This included the Chronology of events as per the attached Appendix A.

The WG also interviewed relevant officers still working for the Authority and also met with those Members who had indicated that they wished to provide information to be considered by the Group. These included the local Ward Member (Cllr. Mrs. Clish-Green), the Leader of the Council (in his capacity as Vice-Chair of the P&L Committee during the relevant period), Cllr Mrs Marsh as Chairman of the P&L Committee from May 2011 and Cllr. Mrs Ewings.

3. The Working Group's Findings

- 3.1 There was general acceptance by both the Planning Officers and the Planning Solicitor that a greater awareness of current planning legislation and case law could have avoided the legal loophole being exploited. (One of the objections to the application was that if granted it might permit food retailing but it was rejected without alerting the Council to give consideration to the possibility of granting permission for food retailing.) The representatives from both departments accepted that a greater scrutiny of legal planning issues was required on an ongoing basis. The Head of Service for Planning, Economy and Community however identified a number of recent case law incidents where other local authorities had to deal with similar legal proceedings as per the attached Appendix B.
- 3.2 As indicated above, the WG was provided with extensive records of all the communications particularly between the Planning and Legal departments. The WG found the 'paper trail' in the Legal Department more comprehensive than in the Planning Department which may be a reflection of different departmental practices but which should become consistent across the authority.
- 3.3 There was general acceptance that the protracted process and subsequent delay in the submission for Judicial Review was the major factor in the failed legal process. It was recognised that this was partially the result of the case being passed back and forth between the Planners and the Legal department. There was a clear need for all such cases to have a clear ownership by a specific party with full responsibility for such issues to be resolved within an acceptable timescale.
- 3.4 The WG was concerned that work pressures in both the Planning and Legal Depts. had contributed to the delays that occurred. However the Chief Executive and the Head of Service for Planning, Economy & Community expressed their belief that neither Dept experienced an *overload* of work.
- 3.5 In his Judgment, the Judge stated (para. 11.12) that "but for the delay and prejudice issues, it is likely that the Claimant [Cllr. Sanders] would have obtained permission for Judicial Review" (i.e. would have had the case heard but not necessarily granted).

The decision by Members to wait for the outcome of the Retail Study before deciding whether or not to pursue the Judicial Review option resulted in a further delay. It was noted that the court identified the findings of the Retail Study as irrelevant to the outcome of the legal proceedings (28.32). “It appears that no thought was given to asking for the consultant’s view, even if provisional, before or after that date” [Sept., 2011, the date since which the consultant had been working on the retail study].

- 3.6 The lifting of the Devon County Council covenant which restricted trading on the site to non-food retail clearly had an impact on the final outcome although not strictly a planning issue. There was concern that, the Council being unaware of the County Council’s negotiations for the release of the Covenant, it may have been regarded as a “safety net” and thus diminished the urgency of the matter.
- 3.7 As identified in the WG’s interim report to the June 2013 O&S Committee meeting, there was criticism that officers did not make Members fully aware of the option to revoke the planning permission although it was touched on briefly verbally in the Meeting. It is now accepted that this option should have been detailed in the report to Members. However it is fully accepted that this option was not considered to be relevant due to the unacceptable level of compensation costs that would have been incurred.
- 3.8 Likewise, it is felt that the “do nothing” options should have been given greater consideration in the report i.e. consequences of not making an application for Judicial Review and a secondly a fuller assessment of the planning merits in particular the impact of unrestricted retail use of the subdivided unit. This needed to be balanced against the legal issues of delay, prejudice and public interest and this probably led to too much weight being given to the outstanding retail study.
- 3.9 The need for prompt action, after the expiry of the three-month period, does not seem to have been fully appreciated by Members or officers. As they were involved with other Judicial Review applications for S.H.D.C., it may be assumed that our own lawyers were aware of the need for prompt action but were undermined by the lack of urgency apparent on the part of our external advisers (another aspect of lack of “ownership”).

Instructions to Counsel were issued on the 24th November, 2011, (seven weeks after the expiry of the three-month period, but three days after the Legal Dept had received the request to do so). The Instructions asked for an Opinion in seven days or an indication when Counsel would advise.

It is not clear if that was followed up as it is noted that Counsel’s Opinion is dated 12th January, 2012 but date stamped as received by the Council on 25th January.

Neither Instructions nor Opinion refer to any remedy, simply addressing the correctness or otherwise of the Opinions obtained by other parties.

A further Opinion was sought, instructions being acknowledged by Counsel on 5th March, 2012. An Opinion was emailed on 12th March making specific reference to the possibility of Judicial Review.

In the Opinion (paras. 4 & 5), Counsel advised a “pre-action” letter to Marchfield on the basis “we could backtrack” if Marchfield produced sufficient evidence of prejudice caused by the Application for J.R. This seems to imply that Counsel assumed that the Council would proceed immediately with its Application but the Opinion concludes “the decision about the pre-action letter must be taken speedily

and the letter written as soon as possible. Any further **great** delay would be fatal” (*our emphasis*).

The pre-action letter was sent on the 26th March and Marchfield’s reply was dated 2nd April.

The Council considered the recommendation for Judicial Review on 17th April, 2012, and it is difficult to dispute the Judge’s comment that “the Council saw neither any great urgency in dealing with the matter nor were particularly careful in considering their options or the consequences for the public interest generally”. The WG is of the view that some responsibility at least rests with the Council’s external advisers for not properly addressing the issue of timing and not reviewing the viability of the application with the passage of time. It is also apparent that the external solicitors acted as a ‘middle man’ rather than an advisor.

It is not clear if, in the context of “prejudice” (see Judgment para. 41. 45), Counsel considered Marchfield’s reply to the pre-action letter and the possibility of “back-tracking”. (Perhaps it was not referred to Counsel –“ownership”?)

The Judge was also clear in his comments (Paras. 49.59 et seq.) on the public interest ground of the application and the WG is not satisfied that the Council was properly advised on this aspect of the Application.

- 3.10 Members’ involvement prior to the report to the April 2012 Full Council was very limited. There was some initial contact with the Local Ward Member when the planning application was being considered but this contact was not maintained (presumably because no problem was perceived – see 3.1. above). Had the full implications of the application been known, all Tavistock Members should have been consulted as well as the Ward Member.
- 3.11 There was an informal “briefing” by the Head of Service for the Chair and Vice-Chair of the P&L committee on 23 February 2012. However there is no record of this briefing given by the Planning Officers and the details of the meeting are unclear. This is seen as an issue of some concern, i.e., when officers perceived a need to brief or consult Members on an issue evolving from operational to policy, there should be a record of the discussion.
- 3.12 At the time of the production of this report the Deputy Monitoring Officer reported that the primary concern as to whether the site can be lawfully used for food retail remains unclear. An application for a certificate of lawfulness is due to be determined by the Planning Inspectorate but all parties have agreed that this should be held in abeyance until the judgement of a case heard in the Court of Appeal is handed down.
- 3.13 It is anticipated by both parties and indeed the Judge in our own case that this decision may provide a clear ruling on the matter. The case raises important issues about the construction and effect of planning permissions. In assessing what has been granted planning permission, a more detailed analysis of the application and drawings may now be required. In addition, where planning permission is given for alterations whether this amounts to a material change of use of the site.

4. Conclusions

4.1 Planning / Legal training / awareness of statutory changes – Term of Reference

(i)

The WG recognises the problems of busy officers keeping “up to date”

This has been addressed by the officers in both the Planning and Legal depts. with a more structured process. The WG understand that arrangements are being put in place to assist working between the two departments. The WG have been advised that bi-monthly meetings will take place between the Head of Planning, Economy and Community and the Link Lawyer to enable a strategic overview of issues, and monthly meetings will take place between the Link Lawyer and the Development Manager. Training will be discussed and arranged as appropriate. It will be shared to ensure that best use is made of resources. In addition there will be training sessions for all relevant staff which will take place twice a year. Members may also be invited to training sessions on the same topics.

In terms of answering the Term of Reference (i), the answer is probably yes, but is noted that this continues to be an area of evolving case law.

4.2 Ownership / Timescales – Term of Reference (ii)

The interaction between the Planning and Legal Depts. and this ‘ping-pong’ effect resulted in unacceptable delays in dealing with the application. This has been addressed within the new structure of the Legal Dept which was recommended in their recent service review. There is a single Legal Link Officer meeting regularly with senior planning officers and the Head of Service to ensure current cases are properly managed, to discuss future demand and introduce systems to manage workflows and training requirements. The Link Lawyer will also take ownership for disseminating case law to planning officers and those officers will ensure that their knowledge is kept up to date.

Planning cases should be owned by the Planning Department, however the Head of Planning, Economy and Community has no control over legal resources so there must be regular meetings and working together. It is also apparent that different officers were at different starting points in terms of the level of their knowledge and assumptions were made about understanding. This must be addressed and common understanding ensured. Term of Reference (ii) has been addressed in para 3.3 and 3.9.

4.3 Members’ Involvement and The Role of the Local Ward Member and member’s involvement – Term of Reference (iii and v)

The informal briefing of the Chair and Vice-chair of the P&L committee on such a crucial issue is seen as unacceptable. It is recommended that such meetings (when officers have specifically invited Members to attend to discuss an issue or issues) are properly recorded on a more formal basis. As the application had previously been referred to the Ward Member, should she have been invited to the meeting? It is not clear what the purpose of the meeting was: to inform Members, to seek guidance or approval, to pass or share responsibility? If it was important enough to raise with Members, it must be important enough to have a note of the purpose and outcome of the ‘briefing’.

Term of Reference (iii)

The reports to Members should have included all of the options. An assumption was made that revocation was not realistic and the ‘do nothing’ option was not discussed. Again, assumptions may have been made about the level of Member’s understanding and all options should have been included and explained.

Term of Reference (iii) has been addressed in para 3.7, 3.8 and 3.10.

Term of Reference (v)

The local Ward Member was consulted at an early stage, but was not kept informed of how the case was progressing. Ward Members have a right to know about such important issues that are taking place within their Ward. The involvement of other Members, in this case the Chair and Vice Chair of Planning and Licensing Committee, took place informally at the conclusion of a Committee Briefing.

Term of Reference (v) has been addressed in para 3.10 and 3.11, and 4.3

4.4. Legal Guidance – Term of Reference (iv)

The internal lawyers should have given clearer instructions to Counsel and instead of asking ‘is this opinion correct’ should also have asked ‘and if so, what are our options’. Opinion was sought but no action taken in the meantime, again alluding to the lack of ownership. Whilst the second Counsel’s opinion was helpful, the first was not.

Term of Reference (iv) has been addressed in para 3.9

4.6 Planning Merits of the Planning Permission – Term of Reference (vi)

It is not possible to second guess if the decision of the Council would have been any different. The planning merits were raised in sufficient detail in the Committee Reports. Reliance was placed on the retail study but the WG notes the reasoning of the Judge

Term of Reference (vi) has been addressed in para 3.8

5 Recommendations:

In light of the conclusions above, the Working Group make the following recommendations:

5.1 A protocol should be put in place to guide working practices between the Legal Department and the Planning Department

5.2 Bi-monthly meetings with the Head of Planning, Economy and Community and the Link Lawyer, and monthly meetings with the Development Manager and the Link Lawyer, should be recorded/noted

5.3 In cases where JR or other serious litigation proceedings are contemplated by the Council or brought against the Council there needs to be an initial meeting of senior officers and regular face to face meetings to ensure that matters are dealt with promptly and all issues fully explored.

5.4 On any occasion where officers feel it necessary to brief Members on a significant issue which has legal, financial or reputational impact, a file note should be made and kept

5.5 Early consideration should be given by the Head of Planning Economy and Community to the public interest in these cases so that the Ward Members and other key Members are properly informed. Agreement can then be reached on the level of input required of Members

5.6 Reports to Members should include all options and an explanation of the potential impact and merits of each option.