

Report for Resolution

Report to Cabinet
01 June 2011

Report of Head of Planning

Subject Legal Challenge to adoption of the Joint Core Strategy for
Broadland, Norwich and South Norfolk.

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Purpose

This report outlines the details of a legal claim made against the adoption of the Joint Core Strategy. It considers the implications of the claim in terms of impact on development management activity and forward planning work whilst the claim is being determined. It also considers the cost of fighting the claim for the Council and seeks delegated authority for officers to act on this matter in a timely manner where needed.

Recommendations

To delegate authority to the Director of Development and Regeneration to authorise costs and instructions and to take urgent decisions in relation to defending the claim made against the adoption of the Joint Core Strategy in consultation with the Head of Law and Governance and Portfolio Holders for Resources and Planning and Transport.

Financial Consequences

See report.

Risk Assessment

See report.

Strategic Priority and Outcome/Service Priorities

The report helps to meet the strategic priority “Strong and prosperous city – working to improve quality of life for residents, visitors and those who work in the city now and in the future”.

Executive Member: Cllr Alan Waters; Cllr Bert Bremner

Ward: All

Contact Officers

Graham Nelson

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Background Documents

Claim Form (ref CO/3983/2011) submitted to the High Court on 3rd May 2011 by Richard Buxton Environmental and Public Law on behalf of Mr Stephen Heard.

Report

Background

1. The Joint Core Strategy (JCS) was formally adopted on 24th March 2011. Section 113 of the Planning and Compulsory Purchase Act 2004 (the Act) provides that once adopted under relevant legislation such a document must not be questioned in legal proceedings except where an aggrieved person makes an application to the High Court on particular grounds and does this within six weeks of the adoption of the document.
2. On 3rd May 2011 Norwich City Council was notified that such a claim had been submitted to the High Court on behalf of Mr Stephen Heard of Salhouse. The claim has been brought against all the local planning authorities involved in the production of the JCS (Broadland District, South Norfolk Councils and the City Council). Mr Heard has brought the claim as an individual although members may wish to be aware he is Chairman of the campaign group Stop Norwich Urbanisation (SNUB) who are opposed to the development proposed in the JCS particularly as it relates to major growth to the North East of Norwich.
3. In the Claim Mr Heard is seeking: 1) the quashing of the JCS to the extent that it is necessary to do so in order to reconsider growth and in particular housing and related transport provision in Broadland District; and 2) his costs of the application.
4. The grounds of the claim are:
 - “1) The Sustainability Appraisal Report dated September 2009 in support of the proposed JCS and intended to fulfil the requirements of Article 5(1) of the Strategic Environmental Assessment Directive (directive 2001/42/EC) as implemented by regulation 12 of the Environmental Assessment of Plans and Programmes Regulations 2004 and requiring inter alia the report to “identify, describe and evaluate the likely significant effects on the environment of ... reasonable alternatives” and an “outline of the reasons for selecting the alternatives dealt with” fails to do this. There is no assessment at all of alternatives to most policies. The options for major growth locations are summarised. The assessment of the rejected options is less than the assessment carried out later in the report on the accepted option, so no comparable assessment takes place.
 - 2) The major road link to Norwich (expected to be a dual carriageway of the order of 12 miles long) known as the Northern Distributor Road (NDR) needed to service the growth in the Broadland part of the JCS was not assessed at all as part of the process.
 - 3) Failures in process in relation to the JCS including in relation to water supply and affordable housing, by reason of production of materials at a late stage in the Examination in Public process such that the claimant and others were unable effectively to deal with the issues raised before the Inspector.”
5. In the letter accompanying the claim the local authorities were invited to agree

a consent order allowing the Claimant an extension of time to submit evidence. It also should be noted that claimant is seeking a Protective Costs Order in relation to this case and has requested that proceedings be stayed until this is resolved.

6. It should be noted that as the claim has been brought under sec 113 of the Planning and Compulsory Purchase Act 2004 the claimant does not need to seek leave to review (i.e. to demonstrate that their case is reasonable and arguable). This is particularly significant as in this instance the first two grounds of challenge relate to matters that were evident in 2008/09 and that the claimant failed to raise concerns over the legality of the particular documents now questioned before the claim was submitted in May 2011 despite having ample opportunity to do so.

Implications of the Claim

7. There are some very significant implications to the Council both of the appeal being made and in the event of it being successful. In summary the significant implications of it being made are the impacts on development management, the impacts on forward planning work (including the introduction of the Community Infrastructure Levy) and the financial implications of fighting the claim. Implications of the claim being upheld are very significant indeed but cannot be realistically considered at this stage until further evidence in relation to the claim is submitted.
8. With regard to the implications on development management an advice note was prepared for Planning Applications Committee on 19th May. It is attached as appendix 1. It is possible that applications will be received by the City Council whose determination in some cases may be delayed or influenced by the claim, however, in practice the chance of this having a significant impact on development proposals in the City is considered to be unlikely.
9. The implications for forward planning activity are likely to be more significant. The City Council is working on preparing its Development Management Policies and Site Allocations Development Plan Documents (DPDs). Draft versions of both these documents which seek to implement the JCS insofar as it relates to Norwich City were published for public consultation earlier in the year and were due to be published again for pre-submission soundness consultation in November 2011. Although further work can continue to prepare the pre-submission draft documents it is considered unreasonable to publish them for consultation on soundness when there is an outstanding challenge to the adoption of the JCS. Therefore if the legal challenge is not determined by October 2011 it will seriously impact on timetables for preparing both these plans.
10. A similar issue arises with regard to the Community Infrastructure Levy (CIL) which is being prepared jointly with the other authorities in the GNDP. Having a Core Strategy in place is a prerequisite for bringing forward CIL. Although it is possible to continue with further work and consultation over the summer, the timetable for CIL preparation currently envisages pre-submission consultation being carried out in October. Thus if the legal claim is not heard by October 2011 there will inevitably be some delay to the introduction of CIL which may have significant implications on the flow of funding available for infrastructure

delivery in 2012 and beyond.

11. In view of the serious implications of the legal challenge it is essential that the Council and other JCS partners are appropriately represented. To do this NpLaw have been instructed to act on behalf of the Councils and William Upton (Counsel) and Sharpe Pritchard (specialist London Agents) have also been appointed to act in this matter. Mr Upton advised the GNDP at the recent Public Examination and has extensive knowledge of the process followed to prepare the JCS. Sharpe Pritchard are Solicitors and Parliamentary Agents who specialise in providing procedural assistance which is essential in a case of this nature and complexity. As the case progresses it may also be necessary to bring in further specialist advice to prepare evidence.
12. In these circumstances predicting the levels of costs that may be incurred in defending this claim is difficult, however, the advice received to date suggest that the total costs faced by all three Council will be less than £100,000. The Council has limited provision in existing budgets to finance its share of this task and it will be necessary to keep the level of expenditure and funding options under review. If further funds are required a report will be made to cabinet on this matter.

Approach to dealing with the Matter

13. Since the claim was submitted the authorities have responded by instructing NpLaw to act on their behalf who has responded to this claim. An initial letter was sent to the claimant's Solicitor on 12th May (attached as appendix 2) which indicates the Councils will be defending the claim in full. In this letter the authorities also refuse to agree to the extension of time to submit evidence that had been requested and reserve the right to apply to strike out the claim as an abuse of process.
14. In the light of the potential implications of the legal challenge and the disruption particularly for forward planning activity and infrastructure provision it is clear that the local authorities will need to ensure that this matter is expedited and a resolved as quickly as possible. For this reason authority is requested for powers to act on this matter be delegated to the Director of Regeneration & Development to enable the authority to respond quickly as circumstances dictate.
15. With regard to the Protective Costs Order (PCO - a mechanism through which the claimant can protect themselves against having to meet the defendant's costs if the claim is unsuccessful) the Council has been advised that as the grounds of the claim engage EU law the Aarhus Convention applies. Therefore the claimant is highly likely to be granted a PCO at a minimal level and in order to avoid unnecessary delay it would be appropriate not to contest the principle of the PCO, but to seek it being set at a reasonable level. It should therefore be noted that it is highly unlikely that the Council will be able to claim any significant element of its costs back from the claimant in the event of it successfully defending the claim.

Risk

16. There is always some risk in fighting legal claims as whatever the level of confidence about the process that has been challenge there is always a risk that the court will see matters differently. As the claimant has not yet submitted

evidence in support of their grounds it is not possible to assess the chances of success in this instance. However members should note there are two particular risks faced if this claim succeeds.

- Having the JCS quashing in whole or part. This could set the development plan system back by several years and call into question the strategy for growth in Broadland, Norwich and South Norfolk leading to considerable costs in preparing a revised strategy; and
- The Council may have exposure to a third of the claimant's costs in bringing the claim.

Advice for Planning Applications Committee on the implications of the High Court claim brought against Norwich City Council in respect of the adoption of the Joint Core Strategy for Broadland, Norwich and South Norfolk.

The Joint Core Strategy (JCS) was formally adopted on 24th March, 2011. Section 113 of the Planning and Compulsory Purchase Act 2004 (the Act) provides that once adopted under relevant legislation such a document must not be questioned in legal proceedings except by an application to the High Court by an aggrieved person on particular grounds within six weeks of the adoption of the document.

On 3rd May, 2011, the three Councils were notified that a claim had been submitted to the High Court on behalf of Mr Stephen Heard of Salhouse. He is a member of the campaigning group, SNUB ('Stop Norwich Urbanisation'), and was present at some of the examination hearings.

The claimant is seeking:

- 1) quashing of the JCS to the extent that it is necessary to do so in order to reconsider growth and in particular housing and related transport provision in Broadland District; and
- 2) the costs of the application.

The three Councils have acknowledged service of the claim and have stated they will be defending the claim in full.

This note seeks to advise members of the Planning Applications Committee on the implications of the challenge for taking decisions on planning applications in the period before the claim is heard. This period could easily last for six months and in practice may be longer.

The key point to note is that the JCS remains adopted and part of the Development Plan for Norwich City. Planning determinations should still be made in accordance with the Development Plan unless material planning considerations indicate otherwise.

The Council should proceed on the basis that the JCS was lawfully adopted, until such time as the Courts determine otherwise. The Claimant has not asked the Court to make any interim order suspending the operation of the JCS in whole or in part (under sec113(5)) and the claimant has given no indication that they intend to ask the Court to take such a course of action.

There is no doubt that the challenge to the validity of the JCS does cause some degree of uncertainty. It should be noted that the grounds of the claim are very wide. In seeking to quash the JCS "to the extent it is necessary to do so in order to reconsider growth" the challenge can be argued to relate to the all aspects of the JCS and virtually all planning applications that fall to be determined between now and the resolution of the claim. Should the claim succeed it will fall to the Court to determine the extent to which the JCS would need to be quashed.

Therefore, the challenge does create some degree of uncertainty for future planning policy falling within the stated scope of the High Court challenge, and the Councils will be asking the Court to ensure that its determination be expedited.

In the meantime, I would advise the Planning Applications Committee that the fact the challenge has been submitted may be considered material to the determination of planning applications. However, in practice it is not expected that it will carry much weight in relation to applications that fall to be determined by the City Council, even if it is a material consideration. Each case will need to be considered on its own merits but members will only be advised by exception in the circumstances where the challenge is considered significant to the application before you. I do not consider the challenge to be a significant consideration in the determination of any of the applications before you today.

Graham Nelson
Head of Planning
Norwich City Council

19th May 2011

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12 May 2011

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Dear Sirs,

Re: Heard v Broadland District Council, South Norfolk Council and Norwich City Council (Case ref CO/3983/2011)

We are in receipt of the Claim Form that you have served on behalf of Stephen Heard, which seeks to challenge the adoption of the Joint Core Strategy for Broadland, Norwich and South Norfolk ("the JCS") under section 113 of the Planning and Compulsory Purchase Act 2004.

We are instructed by the three Councils with regard to this matter. Please would you address all further correspondence to us, at npLaw, marked for the attention of Fiona Croxen. Please also note that we will be instructing Sharpe Pritchard to act as our London Agents.

The three Councils will acknowledge service in the normal way, and they will be defending this claim in full. They are also considering what further applications need to be made to take this case forward, including your client's request in the Claim Form for a Protected Costs Order.

In the meantime, we write with regard to your request in your letter dated 3 May 2011 that our clients consent to an application to the Court to postpone the

submission of your evidence so that your client has additional time to articulate his claim more fully.

Our clients have considered your request, and do not agree that there is any sensible reason for more time to be allowed.

Whilst it may be that you and your firm's involvement has been relatively recent, your client and those in SNUB have been involved in the JCS process for a long time now. All of the grounds that your client raises are about issues that arose either before or during the examination process, and were part of the discussion before the Inspectors. The JCS was submitted for examination in March 2010, and the examination ran until January 2011 (with public hearings in November and December 2010). SNUB was also aware of the publication of the inspectors' report on 25 February 2011, which was published on the GNDP's website. The notice of adoption dated 24 March 2011 was sent with an accompanying letter to nearly 1,000 people including Mr Heard and other members of SNUB (and these letters were put in the post on 23 March 2011).

Indeed, there is a considerable public interest in ensuring legal certainty about the development plan that now applies in the 3 local authority areas. Any further delay could lead to obvious administrative prejudice and have an adverse effect on a majority of the general public in the Councils' areas. In such circumstances, we consider that this is a suitable case to apply for expedition.

Our clients are also concerned to see that your client has entered outline grounds which, by your reference to the desire to amend them, you appear to concede are defective in whole or in part. In so far as the Councils conclude the present grounds are inadequate in the light of the present course adopted by your client then they also reserve their position to apply to strike out this Claim as an abuse of process.

In the normal course of these challenges, the evidence is generally an instrument for producing the relevant documentation to the Court rather than for advancing legal argument. This should have already been submitted in the Claim Form. We therefore expect that you will be serving your evidence in support of your client's claim in the normal way, within 14 days.

Yours faithfully

Fiona Croxen
Solicitor