

WAVERLEY BOROUGH COUNCIL

VALUE FOR MONEY AND CUSTOMER SERVICE O&S COMMITTEE
20 JANUARY 2020

ENVIRONMENT O&S COMMITTEE
13 JANUARY 2020

Title:

**PLANNING APPEALS PERFORMANCE AND COSTS ARISING FROM JUDICIAL
REVIEWS**

Portfolio Holder: Councillor N Palmer

Head of Service: Zac Ellwood, Head of Planning and Economic Development

Key decision: No

Access: Public

1. Purpose and summary

1.1 This report has been prepared in response to Councillor interest in the cost implications of both planning appeals and judicial reviews relating to planning matters. It is intended to present this report to both the Value for Money and Customer Service and Environment Overview and Scrutiny Committees in January 2020. The purpose of the report is to inform Members of the planning appeals process and the results of appeal decisions. It further informs Members of the implications of appeal decisions for the Council and makes recommendations for improvements in respect of planning decision-making. Brief commentary is also provided in respect of the costs associated with the judicial review into the Waverley Local Plan Part 1.

2. Recommendation

2.1 It is recommended that the Committee notes this report and makes any observations.

3. Reason for the recommendation

Introduction

3.1 If an applicant does not agree with a decision that a local planning authority (LPA) has made on a planning application, listed building consent, or related application, they have a right to appeal to the Planning Inspectorate, an Executive Agency of the Ministry for Housing, Communities and Local Government. The vast majority of appeals made relate to situations where the LPA has refused to grant permission/consent, but an applicant may also appeal against a condition(s) attached to an approval, should they be aggrieved. Similarly, there is a right to appeal against non-determination if the authority has not decided a planning

application within the statutory time limits set down by central government (the so-called 8 week, 13 week and 16 week targets). At present there is no third party right to appeal in England and Wales.

3.2 At the point of making an appeal, there is no fee for either party (with the exception of enforcement-related appeals) and the general principle is that the respective parties should meet their own costs in making or defending an appeal, as applicable. Where a claim for unreasonable behaviour from either party is made against the other and this claim is substantiated, an Inspector can award costs against the party responsible for this behaviour. On occasion, a claim for costs may not be made by either party but the Inspector can unilaterally make a cost award to the party affected by unreasonable behaviour.

3.3 Planning appeals can proceed via a number of different routes. The appellant can request that an appeal proceeds via a certain route but ultimately it is the Inspectorate's decision as to the procedure by which each appeal will be heard. These routes are:

- Written representations (including householder development appeals) – the simplest and most common procedure whereby an Inspector receives written submissions from both parties and makes a decision following a site inspection, which can either be accompanied or unaccompanied.
- Informal Hearings – this involves the submission of written evidence by the main parties with a similar process and timeframe to that used for written representation appeals. However, the process will also include an informal hearing that takes the form of a round-the-table discussion that will be led by the planning inspector. It is intended to be an informal process and allows for all parties to respond to any questions that the inspector might have, and to let everyone make their case known.
- Inquiries - this is a more formal procedure than the hearing route and is usually used for complex cases where legal issues may need to be considered. The main parties will usually have legal representatives to present their case and to cross-examine any witnesses. All parties have the opportunity to present their case, and witnesses are likely to be questioned by the inspector and the other parties as to the evidence that they have presented, including technical or specialist knowledge that needs to be carefully presented and understood by the inspector. An inquiry may take one or several days, or in some cases weeks. The length of the inquiry will depend on the complexity of the case and the number of witnesses involved.

3.4 Appeals against enforcement notices can also take any of the above routes, depending on the complexity and whether any evidence needs to be tested on oath. There are seven grounds upon which an enforcement appeal can be made, namely:

- Ground (a) – that planning permission should be granted for what is alleged in the enforcement notice.
- Ground (b) – that the breach of planning control alleged has not occurred as

a matter of fact.

- Ground (c) – that there has not been a breach of planning control.
- Ground (d) – that at the time the enforcement note was issued, it was too late to take enforcement action against the matters stated in the notice.
- Ground (e) – that the notice was not properly served on everyone with an interest in the land.
- Ground (f) – that the steps required by the notice exceed what is necessary to remedy any breach of planning control.
- Ground (g) – that the time given to comply with the notice is too short.

Appeals costs

- 3.5 Defending any appeal decision comes at a cost to the Council. At the very least, officer time will be spent dealing with an appeal, and the greater the complexity of the issues being challenged, the more the appeal will cost the Council. There are certain topic areas for which the Council may not have sufficient in-house expertise (for example, specialist landscape or highways knowledge) and it will, often, be necessary to seek the services of expert witnesses to assist in defending the Council's position.
- 3.6 An appeal that proceeds down the Inquiry route will be likely to incur further costs as it is usually necessary for the Council to procure the services of a barrister. An inquiry can last more than a single day and often does. Although Waverley is a part of the Surrey Legal Services Framework Agreement and, therefore, can benefit from complete legal fees, it is still a service that carries significant cost burden for the Council.
- 3.7 A further area capable of attracting financial burden to the Council is 'cost awards' for unreasonable behaviour. In most cases, the appellant makes a request to the Planning Inspectorate citing what they consider to have been an examples(s) of unreasonable behaviour. The Council is given an opportunity to respond to this, but ultimately it is a matter for the Inspector to decide whether or not an award is justified. Occasionally, the Inspector can unilaterally decide to make an award of costs against one or either (or both) of the parties where they feel the party(ies) have behaved unreasonably without a specific request having been made. However, this is relatively rare. Although such cost awards against the Council on the grounds of unreasonable behaviour are, thankfully, not frequent, they nonetheless can be high in value and are added to the already significant expense of defending an appeal. National Planning Practice Guidance (NPPG) defines 'unreasonable behaviour' as:
- Introducing fresh and substantial evidence at a late stage necessitating an adjournment or extra expense for preparatory work that would not otherwise have arisen
 - Withdrawal of any reason for refusal.
 - Prolonging the proceedings by introducing a new reason for refusal.

- Providing information that is shown to be manifestly inaccurate or untrue.

3.8 It is important to note that, while the Council has a budget for defending its position at appeal through, for example, the instruction of Counsel and expert witnesses, it does not have a defined budget to cover costs awards and needs to seek a supplementary estimate to pay for these. Furthermore, cost awards can be reputationally damaging for the Council. The right for Waverley BC to request a cost award against an appellant for unreasonable behaviour exists, but is rarely invoked. Given that we do receive a number of spurious appeals each year where proposals are clearly contrary to the development plan and without material considerations that could possibly be sufficient to overcome the policy objections, and also encounter other examples of unreasonable behaviour (such as listed in paragraph 3.7), consideration should be given to challenging such behaviours more regularly, where justified.

3.9 Tables showing the approximate costs of defending planning appeals since April 2018 are presented below. These do not include the cost of multiple officers' time as the case officer, their line manager and a planning lawyer will typically all be involved in preparing for an appeal.

	April 2018 – March 2019 (78 appeals) - £'s	April 2019 – date (66 appeals) - £'s
Legal costs	105,010	79,930
Expert witness costs	22,706	40,480
Cost awards against WBC	1,500 (1 appeal)	53,693 (2 appeals)*
Total	127,716	120,410

*WA/2018/0545 – Land at Waverley's Folly, St Georges Road, Badshot Lea (outline applications for 23 dwellings) – appeal allowed.

WA/2018/1230 - Green Lane Farm, Green Lane, Badshot Lea (section 73 application to reduce the affordable housing provision from 43% to 30%, add conservatories and other minor amendments) – appeal allowed.

3.10 It should be noted that both of the cost claims made this financial year have not yet been agreed by the Council and have been passed to an independent costs assessor to negotiate on the Council's behalf, as is normal practice at Waverley. Generally speaking, negotiations tend to be successful in reducing the value of such cost claims. For example, the cost claim in the previous financial year was originally £3,000 but the assessors negotiated this down by 50%.

Government monitoring

3.11 The Government monitors local planning authorities' planning appeal performance through the proportion of appeals that are allowed following a refusal of planning permission on both major and minor development. The threshold for designation on applications for both major and non-major development, above which a local planning authority is eligible for designation, is 10 per cent of an authority's total number of decisions on applications made during the assessment period being overturned at appeal. If a local planning authority exceeds this threshold in either of these categories, it risks becoming 'designated' by the Government in relation

to the particular category exceeded. Currently, the Council is performing at a level of 8% for major applications and 3.1% for minor applications and is not at immediate risk of designation.

- 3.12 Upon designation of a local planning authority, applicants are able to apply directly to the Planning Inspectorate for the determination of any planning application falling within that particular category. The consequences of this are threefold: losing local accountability for making decisions; reputational damage; and loss of income through planning fees.

Analysis

Figures for allowed appeals

- 3.13 Since April 2017, the Planning Inspectorate has determined 244 planning appeals against decisions made by Waverley Borough Council. Of these appeal decisions, approximately 40% have been allowed. These decisions can be broken down as follows:

- 3.14 Committee decisions:
Of the 244 appeal decisions, 60 were considered by a planning committee. 34 of these appeals were allowed, 19 (56%) of which had carried an officer recommendation to grant permission. 26 of the appeals were dismissed, 13 (54%) of which had carried an officer recommendation to grant permission. These decisions can be broken down further by examining which Committee the applications were considered by:

Planning Committee	Number of appeals	Number of allowed appeals	Number of overturned officer recommendations
Eastern	12	8 (62%)	6
Central	10	3 (30%)	1
Western	17	11 (65%)	7
Southern	13	8 (62%)	3
JPC	8	4 (50%)	3
Total	60	34 (57%)	20

- 3.15 Delegated decisions:
184 appeal decisions were the result of decisions delegated to officers under the Scheme of Delegation. Of these decisions, 60 appeals (33%) were allowed and 124 were dismissed.

- 3.16 Enforcement appeals:
Since April 2017, Waverley has issued 12 Enforcement Notices, all under delegated powers. Of these 12 notices, 6 were appealed and 1 is still within its appeal period. Of the 6 notices that were appealed, 2 were dismissed and 4 are still awaiting a decision. No enforcement appeals have been allowed.

Commonly occurring themes within allowed appeals

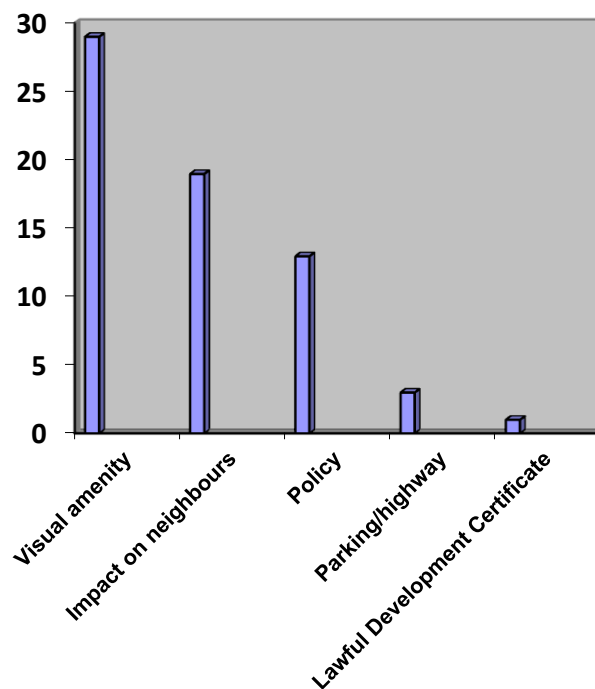
- 3.17 The Service monitors appeals performance through performance indicators; two national and one local. P3 is the local indicator which monitors the cumulative

performance across all planning appeals and the target is that no more than 30% of the total number of appeals made should be allowed.

3.18 For the past four quarters, this target has been exceeded by more than 5% and an assessment has, therefore, been undertaken to establish any common themes within these quarters which may have contributed to the number of allowed appeals.

3.19 Certain common themes have been identified and these are illustrated in Figure 1 below. It should be noted that the local indicator (P3) includes the “other” category of planning applications as well as the “major” and “minor” categories which are enumerated in the national indicators. Waverley is currently meeting the two national indicators so it follows that the under-performance is substantially in the “other” category, that is, householder applications.

Figure 1: Common themes over last four quarters (note that some appeal decisions disagreed with the Council in more than one area)



Visual amenity

3.20 It is clear that the most common area of disagreement between Inspectors and the Council relates to visual amenity. Visual amenity captures a range of planning judgements such as character, appearance and design and naturally includes an element of subjectivity.

Neighbour impact

3.21 Impact on neighbours was the second highest area of disagreement. This is, again, an area where planning judgement must be exercised and includes issues such as loss of privacy and outlook.

Policy impact

- 3.22 The application of policy and, in particular relating to Green Belt, sustainability and ecology, was the next main area for disagreement. Decisions in this area are matters of judgement with regard to how much local circumstances challenge an adopted policy position.
- 3.23 The above brief analysis demonstrates there are certain themes with regard to Inspectors' decisions against the Council. It should be comforting to Members that these relate mainly to judgement issues which can be addressed locally rather than challenging technical issues where Members are not qualified to make the decision.

Suggested improvements

- 3.24 Waverley's policies and other guidance seek to ensure that the highest quality of development is achieved and it is possible to suggest ways in which decision-making can be improved to achieve as much quality as possible within the confines of national guidance. This gives Members and officers scope to work together to improve appeals performance and a number of areas for improvement may be identified for further discussion.

Quarterly appeals analysis

- 3.25 The reintroduction of quarterly appeals analysis to each Committee so that lessons can be learned, where necessary. This will enable Members and officers to ensure that decisions can be robustly defended at appeal and will improve appeals performance. The analysis has in recent months been reintroduced to the Joint Planning Committee but will now also go on a quarterly basis to each Area Planning Committee

Revisions to the pre-application advice process

- 3.26 Revisions to the pre-application process to involve Ward Members at the most appropriate stages in order to avoid inappropriate involvement at a later point in the process. This will ensure that Members' concerns regarding elements of certain schemes can be addressed as early as possible and potentially unreasonable reasons for refusal can be avoided.

Planning committee structures

- 3.27 A review of the impact of our committee structures on appeals performance will be undertaken. Any changes to the committee structure will be considered by the Standards Committee and is subject to decision by Full Council.

Training for Members and Officers

- 3.28 More effective training is needed for all Planning Committee Members and planning officers to ensure appropriate skills and greater knowledge in decision making. This should include emphasis on contentious areas of planning judgement so that, again, any decisions are well considered, reasoned and robust.

Revision of Scheme of Delegation

- 3.29 A review of the Scheme of Delegation may identify areas where more clarity can be given to Members on process. This is likely to have implications for the number of applications which need to come to committee for determination. Any changes to the committee structure will be considered by the Standards Committee and subject to decision by Full Council.

Improvement of committee reports

- 3.30 Shorter, more focused committee reports with a greater emphasis on and clarity over the matters that are appropriate for consideration. This will bring focus to Members' considerations and will reduce the number of unreasonable reasons for refusal that could constitute unreasonable behaviour later at the appeal stage. The new format for reports has already been introduced and will be further refined as necessary.

Local Plan Judicial Review

- 3.31 At November's meeting of Value for Money and Customer Service Overview and Scrutiny, the question of how much the Council has spent to date on defending its position on Part 1 of the Local Plan. Advice has been received that £105,664 has been spent to date with some invoices outstanding.

4. Relationship to the Corporate Strategy and Service Plan

- 4.1 This report relates directly to the Council's vision of 'responsible planning and development, supporting place-shaping and local engagement in planning policy'.

Outcome 4 of the Planning and Economic Development Service Plan 2020/23 is for planning appeals to be 'defended to ensure Council's Local Plan policies and Government targets for quality indicator are met and "Special Measures" designation is avoided'. This report contributes to the understanding of Waverley's performance on planning appeals and the value for money achieved in defending them.

5. Implications of decision

5.1 Resource (Finance, procurement, staffing, IT)

The costs arising from costs awards at planning appeals are not budgeted for so supplementary estimates are required as costs awards arise.

5.2 Risk management

The risk of not addressing the identified issues is that it may lead to further financial risk to the Council.

5.3 Legal

There are no direct legal implications arising from this report itself but legal resources will be required to progress individual cases.

5. Implications of decision

5.4 Equality, diversity and inclusion

There are no direct equality, diversity or inclusion implications in this report. Equality impact assessments are carried out when necessary across the council to ensure service delivery meets the requirements of the Public Sector Equality Duty under the Equality Act 2010.

5.5 Climate emergency declaration

Planning plays a critical part in the Council's response to the Council's climate emergency declaration with regard to the preparation of planning policies and their subsequent implementation.

6. Consultation and engagement

6.1 This report responds to comments made in Overview and Scrutiny Committees.

7. Other options considered

7.1 Not applicable.

8. Governance journey

8.1 The purpose of this report is to inform the O&S Committee of the implications of appeal decisions for the Council. The suggested improvements, as set out at paragraph 3.24 onwards, may require further approval and the appropriate governance process will be followed in each case. Any changes to the committee structure or Scheme of Delegation will be considered by the Standards Committee and be subject to a decision by Full Council.

Background Papers

There are no background papers, as defined by Section 100D(5) of the Local Government Act 1972).

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