


Non-Executive Report of the: Strategic Development Committee 19 November 2015	
Report of: Monitoring Officer	Classification: Unrestricted
Applications PA/15/01337 – 47 Brierly Gardens, London E2 0TF, and PA/15/01832 – 55 Brierly Gardens, London E2 0TF	

Originating Officer(s)	Graham White, Interim Service Head, Legal Services
Wards affected	Bethnal Green

Summary

This report considers the circumstances surrounding the determination of the above mentioned planning applications by the Development Committee and in the light of a potential legal challenge by way of a Judicial Review, proposes that the Strategic Development Committee considers the applications afresh.

Recommendations:

The Committee is recommended to:

- (i) Accept that the decisions of the Development Committee of 3 September 2015 in respect of applications PA/15/01337 and PA/15/01832 were procedurally flawed and invalid; and
- (ii) Consider the applications afresh.

1. REASONS FOR THE DECISIONS

- 1.1 To ensure that the decisions upon the above planning applications of the Committee are valid and not susceptible to challenge on the grounds of procedural irregularity.

2. ALTERNATIVE OPTIONS

- 2.1 The alternative to pursuing the recommended course of action is to take no further action but to risk a challenge by way of Judicial Review.

3. DETAILS OF REPORT

- 3.1 At its meeting on 3 September 2015 the Development Committee considered the above mentioned applications. The applicant for both applications was Tower Hamlets Homes. In both cases the Committee resolved that planning permission be granted, subject to conditions.
- 3.2 On 9 September 2015, a complaint was made by an objector to the applications that two members of the Committee were also Directors of Tower Hamlets Homes and therefore should not have participated in the debate or voted on the applications.
- 3.3 On 3 October 2015 a Judicial Review pre-action protocol letter was received from another objector to the applications. The potential claim is based on a number of grounds, including a conflict of interest in the case of the Committee members who are Directors of Tower Hamlets Homes and the assertion that their participation and voting was a procedural irregularity which rendered the decisions unlawful.
- 3.4 Councillors Francis and Akhtar took part in the Development Committee decision. They were both nominated by the Council to the board of Tower Hamlets Homes and were duly appointed as Directors. At the Committee meetings Councillor Francis declared a personal interest having taken officer advice. With hindsight the advice rendered was not comprehensive. Councillor Akhtar made no declaration.
- 3.5 By virtue of the Localism Act 2011, substantial changes were made to the ethical framework for Local Government and the only interests which are now required by statute to be declared are the new categories of disclosable pecuniary interests. Directorships of Tower Hamlets Homes are not disclosable pecuniary interests. There is no statutory requirement for other interests to be declared, but Councils are able to include other interests in their Codes of Conduct, which is presently the case in Tower Hamlets.
- 3.6 The Council's Code of Conduct, adopted in June 2012 and effective from July 2012 requires the declaration of disclosable pecuniary interests in accordance with the Localism Act 2011 and in addition contains a section entitled 'Interests'. Paragraph 4 of the Code of Conduct provides that a Councillor has an interest in any business of the authority where either
- (a) it relates to or is likely to affect any body of which the Councillor is a member or in a position of general control or management and to which the Councillor has been appointed or nominated by the authority.
 - (b) a decision in relation to that business might reasonably be regarded as affecting the well-being or financial position of a company of which the Councillor is a Director to a greater extent than the majority of other council tax payers, ratepayers or inhabitants of the ward affected by the decision.

- 3.7 In this case, the requirements of both Paragraphs 4(a) and (b) are met and thus the Members have an interest under the requirements of the Council's Code. The Code of Conduct does not specify the nature of that interest but as it is not a disclosable pecuniary interest it must be a personal interest. Nor does the Code of Conduct specify what a member with a personal interest should do about it.
- 3.8 Councillor Francis declared a personal interest whilst Councillor Akhtar did not. However, neither the law nor the Code of Conduct requires the declaration of personal interests and to do so is entirely gratuitous.
- 3.9 Section 31 of the Localism Act 2011, makes it a criminal offence for a Member to participate or vote upon a matter in respect of which the Member has declared a disclosable pecuniary interest but there is no such restriction upon a Member who has a personal interest either to declare that interest or to abstain from participation or voting upon the matter. Thus, the actions of the two members are entirely consistent with the Code of Conduct for Members.
- 3.10 Paragraph 1.3 of the Code of Conduct for Members provides that the Council has approved, amongst other things, the Planning Code of Conduct which is supplementary guidance for Members. It does not form part of the Code of Conduct for Members but Members are required to comply with its provisions.
- 3.11 The Planning Code of Conduct pre-dates the changes effected by the Localism Act and refers to the interests which were declarable under the previous ethical framework, that is to say personal and prejudicial interests. Whilst legislation has moved away from prejudicial interests with the introduction of disclosable pecuniary interests, nevertheless it remains at an Authority's discretion to retain personal prejudicial interests in whole or part. The differences between the Code of Conduct for Members and the Planning Code of Conduct need to be considered in the course of the forthcoming governance review and changes may be considered necessary in order to make the two Codes more consistent with each other. However, until that occurs the declaration requirements of the two Codes are different and the provisions of both Codes must be complied with.
- 3.12 In paragraph 2 of the Planning Code of Conduct a prejudicial interest is defined as one where in respect of a personal interest a member of the public who knows the relevant facts would reasonably think that the personal interest is so significant that it is likely to prejudice the Member's judgment of the public interest when taking a decision and it is a decision which affects the financial interests of a body with which the Member is associated.
- 3.13 Paragraph 2.4 provides that the effect of having a personal prejudicial interest is that the Member must leave the room for the duration of the consideration and decision on the item and not seek to influence the debate or decision.
- 3.14 The determination of an interest in any matter is the responsibility of each Member and in this case the Members may properly have decided that their interests did not amount to personal prejudicial interests and in consequence

they were at liberty to remain in the meeting, participate and vote. However the issue is arguable as demonstrated by the pre-action protocol letter and to test the matter in Court would be a high risk approach. The Council would incur significant costs in the event of not being successful.

- 3.15 The matter could be remedied without incurring any cost by re-submitting the applications to Committee for consideration afresh and for the affected Members to stand aside during the consideration of the applications. This would require the Committee to accept that the original decisions were flawed and that in the absence of valid determinations, it is necessary to determine the applications afresh.
- 3.16 The terms of reference of the Strategic Development Committee provide that it considers any matter listed within the terms of reference of the Development Committee where legal proceedings in relation to the matter are in existence or in contemplation. In this case legal proceedings are in contemplation so the matter is within the remit of the Strategic Development Committee.

4. COMMENTS OF THE CHIEF FINANCE OFFICER

- 4.1 This report recommends that Strategic Development Committee accept that the decisions of Development Committee of September 3rd 2015 in respect of PA/15/01337 and PA/15/01832 were procedurally flawed and therefore invalid, and to consider the applications afresh.
- 4.2 As detailed in paragraph 3.15, the Authority will not incur any additional costs if it decides to pursue the recommended course of action.
- 4.3 As detailed in section 9, were the Authority to take no action and then be challenged by way of Judicial Review, the Authority would incur costs in defending itself. Furthermore, were the Authority to be unsuccessful at Judicial Review, it would likely also incur the applicant's costs.

5. LEGAL COMMENTS

- 5.1 As this report is submitted by the Monitoring Officer, legal considerations are contained within the body of the report.

6. ONE TOWER HAMLETS CONSIDERATIONS

- 6.1 In carrying out its functions, the Council must have due regard to the need to eliminate unlawful conduct under the Equality Act 2010, the need to advance equality of opportunity and the need to foster good relations between persons who share a protected characteristic and those who do not (the public sector equality duty).

7. BEST VALUE (BV) IMPLICATIONS

- 7.1 It is in the interests of best value to minimise costs and to resolve the issue promptly without the need for litigation which would impact positively on economy, efficiency and effectiveness.

8. SUSTAINABLE ACTION FOR A GREENER ENVIRONMENT

- 8.1 N/A

9. RISK MANAGEMENT IMPLICATIONS

- 9.1 The risk of taking no action upon this matter is that an application for judicial review will be made and costs will be incurred in defending it. Moreover if the Council is unsuccessful it is likely that a costs order will be made against it to discharge the applicant's costs.
- 9.2 A somewhat similar case albeit with factual differences reported on 16 October 2015 has further reduced the likelihood of success upon judicial review and thereby increased the risk.

10. CRIME AND DISORDER REDUCTION IMPLICATIONS

- 10.1 N/A

Linked Reports, Appendices and Background Documents

Linked Report

Development Committee 3 September 2015

6.1 47 Brierly Gardens, London E2 0TF (PA/15/01337)

6.2 55 Brierly Gardens, London E2 0TF (PA/15/01832)

Appendices

NONE

Local Government Act, 1972 Section 100D (As amended)

List of "Background Papers" used in the preparation of this report

List any background documents not already in the public domain including officer contact information.

NONE

Officer contact details for documents:

N/A