

STRATEGIC PLANNING BOARD

Date of meeting: 8 December 2010
Report of: Head of Planning and Housing
Title: Broadheath House, Slade Lane, Over Alderley, Alderley Edge - Judicial Review of decision to grant planning permission

1.0 Purpose of Report

- 1.1 To notify members of the result of the Judicial Review proceedings brought against the decision of the Council to grant planning permission for the development at Broad Heath House, Slade Lane, Over Alderley, Alderley Edge, the Judicial Review application was successful and therefore the Planning Permission that had been granted was quashed by the Court.

2.0 Decision Required

- 2.1 To note

- (1) the decision of the High Court to quash the grant of planning permission
- (2) that a report on re-determination will be presented to the Strategic Planning Board which takes into account the judgment and the views expressed by Mr Justice Langstaff
- (3) the implications for future decisions that will be taken based on the judgment and views expressed by Mr Justice Langstaff

3.0 Financial Implications for Transition Costs

- 3.1 The Council will be required to meet its own external costs of defending this action in an amount of £12,929.95, and will also be required to meet the Claimants costs which have been agreed at £32,987.50.

4.0 Legal Implications

- 4.1 The decision of the High Court quashes the Planning Permission that was granted on 8 April 2009. The application therefore currently stands undetermined and will need to be re-determined having regard to the judgment.

5.0 Risk Assessment

- 5.1 Determination of applications for replacement dwellings in the Green Belt will need to be subject to a review, and guidance on whether proposed replacement dwellings are "materially larger" will need to be given to

Planning Officers. Such a review and guidance will minimize the likelihood of further challenge to decisions on such applications.

- 5.2 The possibility of the introduction of a Supplementary Planning Document to assist in the determination of applications that propose a replacement dwelling in the Green Belt needs to be considered.

6.0 Background and Issues

- 6.1 It is relevant to set out some details of the Judicial Review process. This is a process which focuses on the way in which a decision is taken by a public body. It is not a way of challenging a decision on the planning merits.

- 6.2 The challenge will usually be on one or more of the following grounds:
- That there has been a failure to apply the law
 - That there has been a misinterpretation of the law.
 - That a relevant consideration has not been taken into account or an irrelevant one has been
 - That the decision is perverse.

- 6.3 The procedure which governs a claim for Judicial Review is as follows:
- The Claimant sends what is called a pre-action protocol letter to the Council. This sets out the nature of the concerns and the Council has 14 days to respond. The intention of this early step is to allow the Council to produce arguments which either resolve the Claimant's concerns or convinces the Claimant that the claim will not succeed.
 - If the Claimant decides to continue a claim is issued in the Administrative Court which sets out the detailed statement of grounds on which the case is based.
 - The Council must serve an Acknowledgement of Service within 21 days if it wishes to defend the case and must set out summary grounds of defence.
 - The case does not automatically then proceed to a hearing. Rather the claimant has to obtain Permission from the Court. This is a step which allows the Court to filter out hopeless cases. The threshold which the Claimant has to cross is, however, set quite low. Ordinarily the Court decides whether to grant Permission on the basis of the written documents which have been submitted by the parties. If, however, Permission is refused at this stage, the Claimant can require an oral hearing at which the parties attend and where the Claimant tries to convince the Court that Permission should in fact be granted.
 - If Permission is granted the Council then has 35 days to submit its evidence and any further defence it wishes to argue. The case then comes on for hearing.

- 6.4 This case concerned a planning application [09/0842M] which was for the replacement of a dwelling in the Green Belt. The application was

received by Macclesfield Borough on 2 February 2009, but determined by Cheshire East on 8 April 2009. The replacement dwelling included a large entirely subterranean basement which had the effect of significantly increasing the volume and gross floor area of the replacement dwelling as compared to the original but with much smaller increases in height and footprint.

6.5 The application had to be determined taking into account the guidance in Planning Policy Guidance 2 Green Belts and particularly paragraph 3.6 thereof. That Guidance indicates that a replacement dwelling may not be inappropriate development provided that it is not "materially larger" than the dwelling it replaces. That requirement has previously been considered by the Court of Appeal and this case centred on whether the Council, in granting planning permission, had applied the right test.

6.6 The challenge was two-fold:

6.6.1 that the Council had failed to show that it had properly taken into account the extent and effect of the basement. While the officer's report, which recommended that the Committee should approve the application, mentioned the basement it was alleged that this was solely to do with issues of visual impact and not (as other case law provided) in order to make an objective size comparison.

6.6.2 that, even if the Council had properly taken account of the basement as required by the case law, the decision was flawed because it would be perverse for a local authority to conclude that, on the facts here, the replacement dwelling was not "materially larger".

6.7 Permission to proceed with the Judicial Review application, at first instance, was in fact not granted on a consideration of the papers by Mr Justice Pelling. He concluded that the officer report showed that the correct question had been asked and that the Council had taken into account that which it was required to take into account.

6.8 Following this initial decision, the Claimant then asked for an oral review hearing at which Mr Justice Foskett granted Permission to continue. He indicated that, while he could see the force in Mr Justice Pelling's conclusion and while his mind had wavered whilst considering the matter, he would allow the case to go forward although he expressly recognised that the arguments which had found favour with Judge Pelling might prevail.

6.9 The full hearing took place on 11 May 2010 before Mr Justice Langstaff. Both parties were represented by Counsel. The Judge decided that he could not be certain from the documentary evidence that the Council had properly considered the basement in determining if the replacement dwelling was "materially larger" and so quashed the grant of planning permission on that basis. He also ruled that the Council should pay the

Claimant's costs (the normal outcome when a Claimant succeeds). He did not however accede to the argument that the decision would have been perverse and, unusually, gave quite substantial guidance on how such applications should be dealt with in the future.

6.10 The following extract from the judgment indicates how the Council will need to approach the re-determination of the planning application and future applications for replacement dwellings in the Green Belt:

- " 30. ...Here, I conclude that all necessarily depends in an assessment of "materially larger" upon the particular facts and circumstances of a case. It can be said, usually, whether one building is or is not larger than another; though reference may need to be had to particular measurements in respect of which it is said to be larger than the other. Whether it is "materially larger" has to be answered in accordance with the guidance given by the Court of Appeal; that is, primarily as a question of size. But it is not exclusively a question of size...*
- 31. The expression "materially" invites a consideration of size in context; what is the relevant context? The relevant context necessarily has to be the object of and policies relating to establishing a Green Belt. It is possible to give several examples which may illustrate this, and may demonstrate that it is not a sufficient answer to suggest that a qualitative analysis is only relevant within very small increases in size. The first example was that given in the Surrey Homes case. There, the Deputy Judge pointed out that a building might have a much smaller footprint, and have the same overall floorspace, because it was built as a tower; yet if a tower replaced a bungalow, it is not difficult to see how the relevant considerations of size would have nothing to do with footprint, and nothing to do with floorspace, but everything to do with height. In the context of affecting the openness which green belt policy emphasises, the tower might be said to have much greater impact than the bungalow.*
- 32. It is equally not difficult to see that some buildings may have a much larger floorspace as newly-built than those than they replaced, without altering in any way the external dimensions and footprint of the original building. For instance, where a large barn is converted or rebuilt; where a high-ceilinged building is replaced by one with more floors, and therefore more floorspace, but with no change to exterior dimensions. Similarly, it is not difficult to see how, if one replaced a bungalow with a two-storey building on a narrower footprint, the planning considerations relevant to a determination of material largeness would not depend at all upon floorspace or footprint, but in that case upon height and depth of the building.*
- 33. The dictum of Carnwath LJ at the end of paragraph 36 made the point that if an extension were three times the size of the original - and I note that would mean a building four times the size of the*

original, being the original plus the extension - it could not be regarded as proportionate. When looking at a replacement building, the test is not what is "proportionate", though material largeness is to be read in the same spirit. But that is very different, as it seems to me, from the situation here. It seems to me that, in this particular case, a very important fact and issue to which the local planning authority will wish to have regard in attributing whatever weight it thinks is appropriate to the size of the basement is the fact that, as part of the dwelling, that basement is intended to be entirely below ground level.

34. *I could not, in short, have said that it would necessarily and obviously have been perverse for the local authority in this case to have concluded, if it did so having had regard to all proper considerations, that the replacement building was not materially larger than the existing. Providing it did not lose sight of the overall size and floorspace of the basement, the authority would be entitled, in my view, to come to a conclusion that the building above ground was such, and the basement such, that overall, the building, in the contexts to which I have referred, was not materially larger. Indeed, it is plain from (the Officer's statement) that they did not regard that conclusion as being to them, as an experienced planning officer, necessarily perverse.*
35. *But it does not follow that I can say that the decision to be reached by the local authority will necessarily be the same if it has regard to the matters to which it should properly have regard as that it actually reached which is the subject of this litigation...It seems to me that the size of the basement is significant. As a matter of sheer size, the issue of how that affects a conclusion as to whether it is or is not such as to make the building as a whole materially larger than that which it replaces, is not one which I can say necessarily should be determined one way or the other.*
36. *Although this last part of my decision, from paragraph 30 onward, is necessarily obiter, I hope that those observations are of assistance to the parties."*
- 6.11 As a general comment, it is clear from Mr Justice Langstaff's decision that the Local Planning Authority are entitled to take the view that in a given set of circumstances a proposed replacement dwelling that has a basement is not necessarily materially larger in the context of PPG2, and therefore not inappropriate development. This will, however, essentially involve a comparison of size, and the provision of a basement may well be a determining factor in reaching a decision that a replacement dwelling is materially larger, but there will need to be a judgment made on the circumstances of each case. Whatever decision is reached, there needs to be a clear and comprehensive assessment of the existing dwelling and the proposed replacement dwelling, within either the Committee report or the delegated report, that is explicit regarding what

has been included in that assessment and why. It is not sufficient for the Officer to have considered the matter without explaining that reasoning fully and comprehensively in their report, and the decision maker must then take account of that assessment in making their decision.

- 6.12 Clearly in this case, while the Officer's report was approved by a number of Officer's prior to reaching the Committee, the Judge was of the view that the basement issue was not clearly covered within the report, and therefore had not been clearly in the minds of members when they were making the decision. As such he was not able to determine whether proper regard had been had to the required points and if those points had been dealt with, that a different decision would not have been reached.

7.0 Reasons for Recommendation

- 7.1 To ensure that members of the Strategic Planning Board are aware of the decision of the High Court, are aware that this application will need to be re-determined, and of the comments in the judgment about that, and about the future determination of replacement dwelling applications in the Green Belt across Cheshire East. A similar report will be presented to subsequent meetings of the Northern and Southern Planning Committee's to ensure that those members are also aware of the impact of this decision.

For further information: Nicky Folan
Background papers:

Decision of Mr Justice Langstaff dated 11th May 2010

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