

# Planning Committee

10.00am, Wednesday, 2 September 2020

## Legal Review of Council Planning Processes

Executive/routine	
Wards	All
Council Commitments	

### 1. Recommendations

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- 1.1 That Committee notes the findings and recommendations of the independent legal report into Council planning processes undertaken by Shoosmiths LLP.

**Andrew Kerr**

Chief Executive

Contact: Nick Smith, Head of Legal and Risk

E-mail: [nick.smith@edinburgh.gov.uk](mailto:nick.smith@edinburgh.gov.uk) | Tel: 0131 529 4377

## Legal Review of Council Planning Processes

### 2. Executive Summary

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- 2.1 An independent review of certain Council planning decisions has been undertaken by Fraser Mitchell, a specialist Planning Partner at legal firm Shoosmiths LLP. The purpose of the review was to understand the Council's approach to these planning matters and to make any appropriate recommendations which would facilitate general improvements.
- 2.2 A full confidential report has been prepared by Shoosmiths under legal privilege, in order to protect the Council's legal position in relation to the matters under review. This report has been made available to Elected Members for inspection.
- 2.3 This report to Planning Committee summarises Shoosmiths' report.

### 3. Background

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- 3.1 On 24 October 2019, the Council approved a Motion submitted by Councillor Joanna Mowat which called for two things:
  - (i) a report detailing planning appeals from major sites which have been allowed; and
  - (ii) an independent review of these decisions to determine whether the Council's approach to determining these sites aligns with national and local policy.
- 3.2 The Council's Head of Legal and Risk appointed Shoosmiths to undertake the review. It was decided that a firm outwith the Council's appointed legal framework should be tasked with the review, in order to be assured of a completely independent approach.
- 3.3 Shoosmiths undertook a process of interviewing relevant Council officers in Planning, Committee Services and Legal and reviewed relevant policies and associated documentation.
- 3.4 Shoosmiths submitted their report to the Council on 24<sup>th</sup> July 2020.

## 4. Main report

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### **Purpose of Review**

- 4.1 The purpose of Shoosmiths' review was to assess the Council's approach to managing complex or high profile applications. In particular they were asked to assess how the Council identifies and manages risks in relation to its decision making. This would include
- (i) risk of decisions having to be revisited;
  - (ii) risk of costs being awarded against the Council; and
  - (iii) risk to reputation.
- 4.2 The review also considered the following:
- (i) internal Council processes, including the point at which legal advice is sought;
  - (ii) how planning judgment has been utilised, including how and when this is exercised;
  - (iii) the positions adopted by the Council in the sample cases, identifying relative strengths and weaknesses;
  - (iv) whether the Council is adopting a consistent approach in its decision making;
  - (v) how the Council's approach and outcomes compare with other local authorities, particularly on number of applications versus appeal and appeal expenses win/lose rates; and
  - (vi) how risks could be better managed in dealing with planning applications.

### **Scope of Review**

- 4.3 The planning decisions which were in scope of the Shoosmiths' review were:
- (i) planning application reference 16/04738/PPP and appeal reference PPA-230-2207 ("West Craigs");
  - (ii) planning application reference 18/01428/PPP and appeal reference PPA-230-2253 ("Granton Harbour");
  - (iii) planning application reference 18/04657/FUL ("IMPACT Centre");
  - (iv) planning application reference 17/04578/FUL and planning appeal reference PPA-230-2273 ("Calton Road");
  - (v) planning application reference 18/08206/FUL ("Bath Road");
  - (vi) planning application reference 17/04571/PPP ("Wellflats Road"); and
  - (vii) planning application reference 19/02722/FUL ("Ferry Road").

- 4.4 These applications were selected by the Council to reflect a range of proposals that were either appealed to the Scottish Ministers, judicially reviewed in the Court of Session following their approval, subject to local opposition, or had to address complex planning issues.

### **Review Process**

- 4.5 In order to gather evidence, Shoosmiths carried out interviews with planning officers, committee clerks, and in-house Council solicitors. In total they interviewed nineteen Council employees – six case officers, seven team managers, two service managers, two committee clerks, and two solicitors. They also interviewed a partner from one of the Council's existing panel firms of solicitors, who specialises in local authority planning work, in order to obtain comparative evidence in connection with other planning authorities within Scotland.
- 4.6 The review did not gather evidence from other stakeholders involved in the planning process. At the inception of the review, it was considered whether evidence should be gathered from a broader range of stakeholders and decision-makers. However, it was considered that, when balancing the aim of getting as clear and comprehensive evidence as possible within the timescales in which the review was to be carried out, that it would focus solely on evidence from Council officers.
- 4.7 It is Shoosmiths' view that, notwithstanding this internal only focus, having carried out the review that all material issues that arose in connection with the Council's procedures and decision-making as part of the sample applications have been identified.

### **General Findings**

- 4.8 Shoosmiths found that the Council's Planning team is one that operates in a manner that is not materially out of step with other planning authorities in Scotland.
- 4.9 Compared with other planning authorities in Scotland, numerically the Council has had the greatest number of appeals raised against its decisions, as well as the greatest number of its decisions over-turned on appeal. However, as a percentage of the total number of appeals that have been raised against the Council, the Council's performance can be considered relatively robust. In terms of percentage, it has the joint second-lowest record in terms of being over-turned on appeal. Whilst it is not the highest performing planning authority at appeal, its performance cannot be considered anomalous when compared to other authorities in Scotland.
- 4.10 Shoosmiths found numerous areas of good practice and encountered a committed and dedicated body of planning officers. All officers interviewed by Shoosmiths engaged fully and frankly in the review process.
- 4.11 A number of areas for development and improvement were highlighted by Shoosmiths which formed the basis of the key recommendations included in the report.

## **Key Recommendations**

4.12 In summary terms in relation to the issues identified, Shoosmiths made the key recommendations noted below.

### **4.13 Dealing with difficult applicants: -**

- (i) if it is identified that an applicant may be challenging in a negative sense senior planners should be deployed to either handle the application or support the case officer in their handling of it.
- (ii) If an applicant or their agent acts in an unacceptable manner towards any officer of the Council, then they should be excluded from any meetings involving officers that occur in connection with the application. In place of the applicant, professional advisors could be asked to attend meetings on their behalf.

### **4.14 Supervision and Support for Planning Officers: -**

- (i) The allocation of major applications to case officers should be thoroughly considered, having regard to the nature and scale of the proposed development and the experience and skill-set of the case officer.
- (ii) Senior managers should regularly review the applications being dealt with by their teams to identify where additional support or supervision may be required. Where necessary, senior management should be deployed to assist with the progress of applications.
- (iii) Resourcing levels should be kept under constant review, particularly in teams that deal with a high-volume case load.

### **4.15 Correspondence submitted prior to the DM Sub-Committee Meeting: -**

- (i) New guidelines or procedures should be developed to ensure that material correspondence is properly considered by planning officers and by elected members before an application is determined.

### **4.16 Supporting information and internal consultee responses: -**

- (i) Where it does not already exist, the Council should provide clear and unambiguous guidance to applicants that any failure to provide the required supporting information will have an adverse impact on the period for determining the application. Robust pre-application consultation discussions should be used where possible to flush out potential issues and establish what areas require to be examined as part of the Council's consideration of the development proposals.
- (ii) Internal arrangements should be established requiring internal consultees to provide their responses to applications in a considered and timeous manner.

**4.17 Debrief Process: -**

- (i) Where a planning application is subject to an appeal or legal challenge, it should be mandatory to have a formal debrief among the officers involved in the application.
- (ii) A debrief should be carried out in connection with all major applications that are determined by the Council.

**4.18 Preparation of reports to the DM Sub-Committee: -**

- (i) The Council should consider a change to its style/model report to the DM Sub-Committee to ensure that all types of development are considered under the appropriate assessment framework.

**4.19 Legal advice (sought by planning officers): -**

- (i) A clear procedure or guidance should be formulated so that legal advice is sought by planning officers in appropriate circumstances and at the most appropriate time.

**4.20 Legal advice (provided by in-house solicitors): -**

- (i) Where possible legal advice should be provided in written form. The advice should contain reference to the issue raised, the legal framework relating to it, the application of the law to the circumstances, and a conclusion. Extracts from cases and legislation should not be provided without an explanation as to what the terms mean, and how they would apply to the circumstances.
- (ii) It is incumbent on in-house solicitors to ensure that no planning officers leave meetings uncertain about either the legal advice that has been provided, or the next steps in the process.
- (iii) Where in-house solicitors feel that the questions being asked of them are outside their range of expertise or there are capacity issues then those matters should be referred to panel solicitors.
- (iv) A solicitor should attend all meetings of the DM Sub-Committee.

**4.21 Elected members and the DM Sub-Committee: -**

- (i) Compulsory training should be provided to each member of the DM Sub-Committee at the time they are appointed. Elected members should be discouraged from participating in the decision-making of the DM Sub-Committee until they have completed the relevant training
- (ii) Any member elected convenor of the DM Sub-Committee should receive comprehensive training and support.
- (iii) Elected members should receive compulsory training on the role of a planning officer, to ensure that the DM Sub-Committee is aware of the work that they carry out, and the expertise and skills that they possess.

- (iv) As a general rule, Elected Members unable to attend a site visit should be excluded from participating in the determination of the planning application. A clear exception to the general rule would be where a site visit raises issues of accessibility for any elected member. Further exceptions to this may be where (i) a member is the ward councillor for the application site, and therefore could reasonably be assumed to have sufficient knowledge of the site; and (ii) where an elected member cannot attend the site visit because of competing material demands on their time. Consideration should be given in those circumstances as to whether alternative tools can be utilised to ensure that elected members are familiar with the site – for example, whether it would be possible to have a virtual tour of the site.
- (v) The introduction of a form of “pause” mechanism to committee procedures. This would either take the form of a break in proceedings for a prescribed period of time at the instance of a planning officer, solicitor, or clerk. This would enable officers to clarify factual issues or planning matters with members.
- (vi) Where the DM Sub-Committee takes a decision that is contrary to the recommendation of the Chief Planning Officer, members should be reminded that they can only overturn that recommendation for proper planning reasons. A procedure should be introduced to enable individual members to check the proposed reasons for their prospective decision with planning officers and/or solicitor at the end of the debate section, before the committee moves to a vote. This would help ensure that the committee is effectively exercising its planning judgment and that its decisions are supported by proper planning reasons.

## **5. Next Steps**

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- 5.1 Council officers in Planning, Committee Services and Legal will take steps to implement the key recommendations of the Shoosmiths report.

## **6. Financial impact**

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- 6.1 As a result of the key recommendations in the Shoosmiths’ report, an additional Planning Solicitor is being recruited, with resultant financial impact. Further resource implications may arise as the key recommendations are implemented.

## **7. Stakeholder/Community Impact**

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- 7.1 An improved planning process will benefit planning applicants.

## **8. Background reading/external references**

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8.1 Full confidential report for Elected Members made available via secure means.

## **9. Appendices**

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9.1 None.