



# Committee report

Committee	<b>PLANNING COMMITTEE</b>
Date	<b>29 MARCH 2022</b>
Title	<b>PLANNING APPLICATION 20/01061/FUL (KNOWN AS WEST ACRE PARK)</b>
Report of	<b>Chief Executive</b>

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## SUMMARY

1. The planning permission for the Westacre Farm Development (reference 20/01061/FUL) is now ready to issue in accordance with the decision of the committee taken on 27 July 2021. All that remains is to obtain all of the necessary signatures to the section 106 agreement.
2. Normally the Strategic Head of Planning and Infrastructure would issue the decision notice at this point, provided there are no material planning changes which he feels the committee need to know and he is content to do so in accordance with the council's principles of decision making.
3. A fundamental public law principle of delegated authority is that the grant of authority does not require that such authority be exercised. The decision to grant subject to an appropriate s106 being concluded was made by the Planning Committee; the committee remain in law able to reconsider the matter if there is good planning reason to do so.
4. This has been a difficult application to manage, challenges have been received from local objectors and the developer and concerns expressed by some members both for and against the development. There still remains a 'live' motion before this committee; the outcomes of this debate will inform whether this report needs to be considered by the committee at all.
5. In light of these circumstances officers do not consider it appropriate to exercise the delegation granted to them by the Planning Committee in July 2021 and ask that the committee confirms its decision of the 27 July 2021 and that the planning permission then be issued as soon as the section 106 agreement associated with the permission is signed.

## RECOMMENDATION

6. That option A is adopted and the Committee agrees to:

Approve the issue of the formal planning permission in respect of West Acre Park (20/01061/FUL) as agreed by the committee on 27 July 2021

## BACKGROUND

7. This paper is presented for consideration should the Planning Committee's intentions remain unclear after it has debated the 'live' motion proposed for debate on the agenda for the meeting of the 29 March 2022.
8. The Planning Committee considered an application for the development of land at West Acre Park (20/01061/FUL) at its meeting on 27 July 2021. The proposal for this large housing led scheme had raised a large number of objections but following significant deliberation by the committee and a proposal to move refusal of the scheme, which was lost, the committee voted to approve the planning application subject to conditions and the completion of a legal section 106 agreement covering a number of issues including highways, affordable housing, education provision and environmental matters.
9. Since the meeting the council has received correspondence from a legal firm acting on behalf of a residents' group raising concerns over the soundness for reasons of procedural irregularity, misdirection as to application of policy, misapplication of the human rights balancing exercise and / or apparent bias.
10. Independent legal advice, procured by the council on the decision of the committee, was referred to in the paper withdrawn from the committee's published agenda in January, "Review of the code of Practice for Members and Officers dealing with Planning Matters". A copy of that advice was sent to members of the committee to accompany the report. This advice concluded that, on balance the decision made by the committee in July 2021 is safe and "the issues do not, as we have set out in this advice, raise significant legal issues given how they were dealt with".
11. However, some members remain discontent with the decision and the manner in which it was reached. Motions have been submitted to the committee on 25 January 2022 and again on 1 March 2022 asking that the committee be given the opportunity to reconsider its decision of the 27 July 2021. The January motion was not put to the committee in light of the fact that the tenant farmer on the site had withdrawn their objection to the application. The committee did not have time to consider the 1 March motion and it is on the agenda for the meeting of the 29 March 2022.
12. Following drafting and discussions between all parties, the section 106 agreement has now been agreed in line with the requirements of the Planning Committee's decision in July 2021 and is in the process of being signed. Once the document has been completed the formal planning permission can be issued.

## STRATEGIC CONTEXT

13. The corporate plan was agreed at Cabinet in October 2021 and sets out the objectives for the council over the next four years. Of relevance to this paper the corporate plan states one the council's core values is:

Being fair and transparent - making decisions based on data and evidence in an open and accountable way.

14. One of the three key areas for action in the corporate plan is the, "provision of affordable homes for Island residents". This is in the context of a key aspiration to "only develop greenfield sites when absolutely necessary".

## CONSULTATION

15. Whilst there has been no specific public consultation about this report, the planning application has been the subject of significant consultation which was summarised in the officers' report to Planning Committee in July 2021.

## FINANCIAL / BUDGET IMPLICATIONS

16. If the objectors to the development make a successful judicial review challenge of the council's decision to award it planning permission then the council would most likely have a costs award made against it together with having to bear its own costs. However, independent legal advice is that such an action would be defensible.
17. If the applicant makes a successful claim for non-determination of the decision against the council it could result in costs being awarded against council. This would require the applicant to demonstrate, or the inspector to consider, that the council has unreasonably withheld issuing the permission, resulting in the need for the appeal to be lodged. The council would be at significant risk of having to pay the complete cost of the appeal process for the applicant, as well as its own costs in defending the decision, both of which could be substantial, having regard to the scale of the application.
18. On appeal an inspector would take into account that the current is for approval of the development. If the application was to be reconsidered prior to the appeal papers being submitted and an alternative resolution presented, this could be considered as unreasonable and costs against the council could be significantly greater in the absence of no material change in circumstances since the original resolution.
19. Should the application be refused by the Isle of Wight Council, but permitted on appeal by the Planning Inspectorate then the council will not receive any New Homes Bonus for the site. Although this is not a material consideration in the determination of the planning application, however it may be relevant to the consideration of the options set out in this paper.

## LEGAL IMPLICATIONS

20. The council is in receipt of a number of letters from a law firm instructed by a company that has recently been formed by a local resident's association. The council is also in receipt of letters from a separate law firm that act on behalf of the applicant/developer. It is not uncommon to receive letters from both sides alleging concern particularly relating to controversial planning applications.
21. The letters on behalf of the resident's association allege that the July 2021 decision is unsound due to procedural irregularities, misdirection of policy, misapplication of the human rights balance and / or apparent bias. The letters request the matter be brought back to committee for reconsideration to rectify any alleged procedural defects.
22. The council remains subject to its duty under section 70(2) to have regard to all material considerations, including those that arise after the resolution in July 2021, and may in theory reconsider an application. However, in the exercise of such powers a council must not act irrationally but rather must act appropriately and proportionately. Whilst it is legally possible for the committee to reconsider the application there are risks associated with doing so as set out in this report.
23. The procedural irregularities alleged are that certain councillors were unlawfully excluded from participation at the July meeting. These members referred to did not take part either due to having not attended the formal site visit or due to having pre-determined the application. The decision as to whether a councillor is able to take part in the determination under either of these scenarios is a matter of judgement for the councillor alone although it is very much encouraged that they do so having regard to advice from the monitoring officer. However, that judgement is subject to scrutiny by the High Court if judicial review proceedings were issued. External advice confirms that it was proper for the councillors concerned to not take part in the determination of this application.
24. The further procedural irregularity alleged is that the vote was taken after the meeting had finished as no extension of time was properly agreed. It is the monitoring officer's advice that the extension was properly agreed and therefore this point is also defensible.
25. There is an allegation that the officers presenting the report did so in a manner as to appear biased. The officers' report set out their assessment of the application and gave their recommendation. Throughout the meeting the officers gave their professional advice and advised on issues and the risks, as they considered them based on their experience and knowledge, to the members of the committee. Providing professional advice to the committee should not be seen as being biased, as they are very clearly two different things.

26. Due to a lack of delivery on the Island the authority is under a presumption in favour of sustainable development. Therefore, there is a genuine policy basis for the proper advice the officers gave regarding the balance of the decision.
27. The allegation the committee were misdirected as to the relevance of the development plan is also considered to be without merit and the committee were advised accordingly.
28. It is also contended that the Planning Committee were wrongly advised as to the relevance of the emerging Island Planning Strategy. Officers consider that the advice given at that time was correct and entirely consistent with paragraph 48 of the NPPF, especially 48(a).
29. Further policy concerns have been raised as to whether officers' advice was correct as to the application of policies SP1 and SP2. Officers have reviewed that advice and consider the advice given remains correct and defensible upon challenge.
30. The allegation the meeting was procedurally unsound due to the misapplication of policy is that it is alleged the committee were misdirected as to the relevance and application of the current development plan, the emerging Island Planning Strategy and the ability for councillors to rely upon policies SP1 and SP2.
31. A further allegation is that the council failed to properly apply the human rights act balance that was required. It is officers' view that the July decision did properly balance the qualified right. In addition, the subsequent withdrawal of the tenant farmer's objection has reduced this risk further.
32. The final allegation is that a councillor that did participate would, to an objective bystander, appear biased (apparent bias). It is officers' view that the councillor was not apparently biased in law.
33. If the committee confirm that the permission may be issued, then any objector would have six weeks from the date the authority granted planning permission to issue proceedings in the High Court. The first stage of any proposed claim for judicial review is for the claimants to secure permission of the court to proceed. Only once permission has been granted can a claim progress to a full hearing. Until any claim is concluded, unless an order is made to the contrary, the developer would still have an extant permission, but would proceed at their own risk as the High Court have the ability to quash the permission at the conclusion of any proceedings.
34. If the permission was quashed the application would be remitted back to the council for further determination and costs in the claim would be awarded against the council. If the council were to successfully defend the proceedings, or permission to bring the claim was refused, then it is likely the council would also be awarded costs. The council may seek to protect its position in costs by seeking costs protection from the High Court in a situation where the claim was issued by a company with little or no assets.

35. The applicant's/developer's lawyers have submitted that the committee is unable by motion to refer the matter back to the committee, and that if the matter is delayed by reconsideration that the developer will appeal due to non-determination.
36. This paper seeks to confirm if the matter is brought back, rather than by motion on notice by a councillor, this point is academic, but the officers disagree with the point on this particular matter.
37. There is a risk of an appeal for non-determination as the period within which the Local Planning Authority (LPA) should have determined the application has elapsed, as has the written extension agreed with the developer. It is therefore now open to the developer to appeal non-determination at any point. If this were to occur, then there is a risk that the developer may seek costs in part or wholly due to what it would allege were unreasonable delays in determining the application. It should be noted that a Planning Inspector has the ability to award costs, regardless of whether a cost request is made.
38. There is a risk of challenge with either confirming the authority of officers to issue the permission, or requiring a report be brought to committee for further determination.
39. Whilst there is an inherent litigation risk with either option it is considered the risks association with not issuing the permission are greater than the risks associated with issuing the permission.

## OPTIONS

40. The options available are as follows:

**Option A** Approve the issue of the formal planning permission in respect of West Acre Park (20/01061/FUL) as agreed by the committee on 27 July 2021.

**Option B** Not approve the issue of the formal planning permission in respect of West Acre Park (20/01061/FUL) and request the application is brought back before the planning committee for reconsideration.

## RISK MANAGEMENT

41. The issuing of the formal planning permission would comply with the LPA's normal procedures as set out in the council's constitution and ensures consistency in decision making. It would also significantly reduce the risk of an appeal for non-determination by the applicant which would, as result, remove the risk of any cost award against the council through the planning appeal process.
42. The issuing of the decision notice may lead to a legal challenge to the LPA, which would have to be via a judicial review of the decision. The judicial review would examine the procedures of the committee in arriving at its

decision, rather than the decision itself. The council has taken its own legal advice which indicates the risk of a successful challenge is low in that the council's decision is sound and therefore defensible.

43. If the decision notice is not issued there is a significant risk of appeal on the grounds of non-determination and given the planning committee's resolution to grant approval for the scheme a high risk of an award of costs against the council resulting in financial loss and reputational damage.
44. Not issuing the decision notice would also provide uncertainty in the decision-making processes of the planning committee, where applicants would not be able to rely on the decisions made in a public forum where a vote was taken to approve the development and no new material planning considerations have arisen since that decision. This could lead to loss of investor confidence in the Island, particularly the delivery of housing and affordable homes, which are key objectives of the authority.
45. Agreeing to issue the decision notice would enable the council to improve its five year land supply position and would not, at this stage, negatively impact on the delivery of the draft Island Planning Strategy.
46. The Local Planning Authority is operating under the National Planning Policy Framework's 'presumption in favour of sustainable development' because of a lack of a five-year land supply, falling under the Housing Delivery Test threshold and because of the age of the Core Strategy. Essentially in the government's view the council has not permitted enough new homes, built enough new homes and its plan is too old.
47. This assessment is in part a consequence of the government's standard method for calculating housing numbers. The draft Island Planning Strategy (IPS) seeks to plan for a number of new homes below the standard method calculation. If this approach is endorsed by the Planning Inspectorate, it will mean the council has an up-to-date local plan and enable a reset of its five-year land supply and Housing Delivery Test figures.
48. Should the lower housing number proposed in the IPS not be accepted then the council will continue, on the current trajectory, to not be able to demonstrate a five-year land supply or sufficient housing delivery to meet the thresholds of the Housing Delivery Test. In such a scenario and under current legislation the only way for the council to remove itself from the presumption in favour of development will be to permit significantly more new homes and for significantly more new homes to be built.

## EVALUATION

49. Whilst the planning application at West Acre Park is, and continues to be, contentious a decision not to issue the formal decision notice at this stage could result in significant legal, financial and reputational issues for the authority. It is concluded that these risks outweigh the legal, financial and

reputational risks in not issuing the permission and having a report brought back before the committee.

50. Nevertheless, these are matters for members to finally determine in accordance with the principles of good decision making as provided for in the council's constitution.

## BACKGROUND PAPERS

["Isle of Wight Council, Governance Advice"](#), Veale, Wasbrough, Vizards, December 2021

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