South Tyneside Council

LPA Statement of Case

Planning Inspectorate Ref.	APP/A4520/W/24/3349402
South Tyneside Council Ref.	ST/0838/23/VC
Appeal by:	Mr Mark Turnbull
Site address:	Former Brigham and Cowan Dock 4 Entrance Long Row South Sheilds NE33 1JA

1.0 Background

1.1 On 25 January 2024, South Tyneside Council ("the Council"), as Local Planning Authority [LPA], received a valid section 73 planning application ("the application") relating to "Installation of floating pontoon and wave break, with access ladder" at the appeal site. The application was made to request a variation to the wording of condition 6 of previously approved planning application ST/0353/20/FUL - to allow for the mooring of safety vessel(s) or those engaged in educational use, in addition to the mooring of recreational leisure boats already permitted.

1.2 The application was subject to a written requests from a Councillor, with reasons, that it be determined by Planning Committee. The request, in line with requirements set out in the Council's Constitution was such that the planning application could not be determined under delegated powers.

1.3 The Council's Planning Committee considered the application at its meeting on 17 June 2024.

1.4 Planning Committee resolved to defer its determination of the application, until a final determination on the Long Row Definitive Map Modification Order Application ("the Long Row DMMO application") had been reached.

1.5 A copy of the officer report and [advance copy of the] minutes have already been submitted to the Planning Inspectorate by the LPA, as part of its appeal questionnaire bundle. Additionally, the LPA can confirm in this statement that those minutes are now recorded as being agreed. Please refer to the minutes provided at Appendix 1 of this appeal statement.

2.0 Planning Committee actions that have taken place since the 17 June 2024

Relating to the Long Row DMMO application

2.1 The Council's Planning Committee considered the Long Row DMMO application at its meeting on 15 July 2024 and resolved to decline to make an order. Please refer to the minutes at Appendix 1 of this appeal statement for evidence of this being the case.

2.2 Additionally, and for information, the Council has been notified by the Planning Inspectorate on 12 August 2024 that an appeal has been made against its decision to decline to make an order. That [Schedule 14] appeal is pending consideration and determination by the Planning Inspectorate (and they have not, at the time of submitting this appeal statement, assigned it a reference number).

Relating to this non-determination appeal

2.3 Planning Committee was invited at its meeting on 28 August 2024 to advise what they would have done with the application [ST/0838/23/VC, had they not deferred their decision upon it], having regard to the Item 5 – Chairperson's Urgent Item report that they were provided with. That report is enclosed at Appendix 2 and please note that appended information to which it refers to (i.e. copy of the committee report and minutes) has been excluded [from Appendix 2], as that information has already been provided as part of the LPA appeal questionnaire bundle and / or where Appendix 1 of this statement is also relevant too [and for the reasons explained at para. 1.5 above].

2.4 Planning Committee resolved that if it were able to determine application ST/0838/23/VC, that it would have been minded to refuse it, for the following reason(s).

> *The previous decision of the Planning Committee (on 15/03/2021) in relation to its determination of application ST/0353/20/FUL with the condition 6 that was imposed, struck a balance between granting approval for the floating pontoon and wave break, with access ladder and seeking to ensure that residential amenity would not be materially harmed contrary to LDF Policy DM1(B). Furthermore, the Planning Inspectorate dismissed an appeal (on 16/12/2021, Planning Inspectorate ref. APP/A4520/W/21/328918) in relation to the imposition of that condition as it was considered that this condition was both necessary and reasonable to safeguard residential amenity.*
>
> *Planning Committee considered that the proposal in the s73 planning application ST/0838/23/VC to amend the wording of condition 6 that is subject to this non-determination appeal would, having regard to the above material planning considerations, give rise to harm to the residential amenities of nearby residents contrary to LDF Policy DM1(B) due to the additional comings and goings and general activity at the application site that would arise relative to what is currently authorised.*
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> *As such, and in the context of the specific legal requirements in relation to determining S73 planning applications (and as was set out at para. 31 of the committee report for application ST/0838/23/VC), Planning Committee advised that it could not have granted application ST/0838/23/VC subject to a different use restriction condition to that which had been imposed in*

granting application ST/0353/20/FUL. It would follow, therefore, that Planning Commitee would have been minded to refuse application ST/0838/23/VC [for the reasons explained above].

2.5 In undertaking the above, Planning Committee was perfectly entitled to give differing weight to the relevant planning considerations, and, in particular in relation to its consideration of residential amenity impacts [relative to what had been set out in the officer report] and in the context its application of LDF Policy DM1(B) to that matter. It reasonably follows, therefore, that Planning Committee could come to a different view on residential amenity impacts [relative to the officer report]. Furthermore, Planning Committee were aware in doing so and because of the officer presentation on the day, that the appellant is suggesting a different wording to the use restriction planning condition (and as set out in the appellant's appeal statement - see its paras. 3.10 and 3.11) and relative to the wording that was set out in the committee report of the 17 June 2024. That different wording is requesting that the Inspector does not consider any occupancy limitation with regards to moored safety or educational boats, for the reasons set out on the appellant's appeal statement sets out at para. 3.11. Planning Committee took also this into account in their consideration of residential amenity (as set out above) and where in the absence of that occupancy limitation that it considered that there would be yet further harm that would arise [in relation to residential amenity] and in addition to the harm that they had already identified.

2.6 Additionally, Planning Committee were acutely aware of the very close proximity of the development (i.e. floating pontoon and wave break, with access ladder) to residential properties to the north, east and south and that the publicity undertaken in relation to the S73 planning application had generated 23 representations from the public that were objecting to it (plus objections from the MP and a ward councillor), for the reasons set out in the committee report. For information, the closest properties to the north are situated within 12m of the development, the closest to the east within 14m and to closest to the south within 8m.

2.7 Planning Committee also resolved what planning conditions they would suggest, if the appeal were to be allowed. These are provided in a separate "LPA suggested conditions, if the appeal were to be allowed" document.

2.8 For information, an advance copy of the Minutes from the 28 August 2024 Planning Committee meeting will not be available by the date that this appeal

statement must be submitted to the Planning Inspectorate (i.e. by no later than 11 September 2024). Should the Planning Inspectorate require a copy of those minutes, they should make the LPA case officer aware of this and they can be provided once they become available.

3.0 Comments on Appellant's Grounds of Appeal

3.1 The Appellant's grounds of appeal are that, in summary, that their proposed changes to the condition in question and, importantly, as they have set out in their appeal statement (see its paras. 3.10 and 3.11) will not harm residential amenity relative to what is already permitted.

3.2 The LPA respectfully disagrees with the above, having regard to the additional views of the Planning Committee that have been sought and that are conveyed in the previous section of this appeal statement.

4.0 Closing remarks

4.1 The Planning Inspector is respectfully requested to dismiss the appeal.

APPENDIX 1

Extracts from the Planning Committee minutes for the meeting of 15 July 2024 are provided below.

They show that the minutes for the Planning Committee that took place on 17 June 2024 were agreed. They also show (as an advanced copy), the Council's decision on the DMMO application.

Advanced Copy: The Planning Committee need to agree these minutes are accurate but cannot do this until its next meeting on 27 August 2024

item 2

South Tyneside Council

Planning Committee Minutes

15 July 2024

Present: Councillors: S. Dean (Chair), P. Dean, Guy, Keegan, Kennedy, Kilgour, N. Maxwell, McKeown, Myers, Brenen, Leask, Owens-Palmer, Proudlock

Apologies: Councillors: Meling, Ford & Taylor

Also in Attendance:

Andrew Inch (Senior Manager Planning), Geoff Horsman (Team Manager – Development Management), Sean Gallagher (Senior Planning Officer), John Rumney (Corporate Lead Legal and Governance and Deputy Monitoring Officer), Dave Carr (Service Lead, Highways Asset Management), Lisa Tracey (Public Rights of Way Officer), Dan Martin (Student Planner), Drewe Russell (Planning Officer), Paul Fleming (Head of Infrastructure and Transport), Steve Green (Highways and Infrastructure Manager) & Sean Allen (Democracy Support Officer).

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1. Declarations of Interest

Councillor Kilgour declared interests in relation Item 4 as she knows the wife of the applicant, has met them a couple of times and is aware of the application, but noted she is not predetermined due to this.

The Chair read out wording that explained what being "predetermined" meant for the committee as clarification for all

Members raised concerns over members of the committee not declaring interests in Item 4, noting that they felt some members were pre-determined, having been seen to campaign with the applicant.

Another member noted that it was up to each member to declare any interest and that they were all aware that by declaring or not declaring anything they felt was relevant was their own choice and were aware of any possible consequences should this not be correct, it was also noted that this had been noted in training carried out by the committee prior to this meeting.

2. Minutes

The Minutes of the 17 June 2024 were agreed as a true record by the members with the following amendments:

The declaration of interest for Cllr Kilgour was amended to reflect that she knows the wife of the applicant, has met them a couple of times and is aware of applications being made. It was noted that she had not met with both sides of the applications ST/0838/23/VC & ST/0059/24/FUL.

During the Declaration of interest, a concern was raised by Members regarding some other members not declaring an interest when they felt they should be. They felt a conflict of interest was applicable to applications ST/0838/23/VC & ST/0059/24/FUL. It was noted that all Elected Members are responsible for their own declarations of interest and by not raising one, they were content that such a declaration was not required.

Resolved: Minutes Agreed.

3. Planning Applications

Submitted: Report of the Head of Development Services.

The Committee considered the schedule of applications received for planning permission. It comprised the following;

- **ST/0237/24/FUL** – 382 Stanhope Road, South Shields

Resolved: That the applications for planning permission be dealt with as outlined in Appendix 1 of these minutes.

4. Definitive Map modification Order Application – Long Row, South Shields.

Submitted: Report of the Director of Place and Communities.

Dave Carr, Service Lead for Highways, delivered a presentation highlighting the report. The report was to consider an application to add a length of footpath at Long Row South Shields to the council's definitive map and statement, the council appointed Robin Carr & Associates to investigate the application.

The report and presentation outlined the requirements of the council to make an order to modify the DMS (Definitive Map & Statement) if a right of way that is not shown on the DMS 'is reasonably alleged to subsist' (RATS Test)

It was outlined that the Long Row application contained evidence of use, but the question was whether it amounted to sufficient evidence to demonstrate a reasonable allegation of a public right of way.

The conclusions of the Robin Carr & Associates report noted that the Reasonably Alleged to Subsist test was not met. The officers considered the following:

Section 31 HA 1980

- There is clear evidence that the claimed route could not have been used along its full length for the applicable 20-year period for the purposes of Section 31 HA 1980.
- Even within the evidenced period of use (being less than 20 years), there was also an interruption to the use. A claim based on the Section 31 presumption is destined to fail.

Common law dedication

- There is no evidence the landowner intended to dedicate a public right of way when laying out the majority of the route in 2007/8 or subsequently, as opposed to merely tolerating such use. Subsequent closure by the landowner is consistent with toleration of use by the public.
- There is no evidence the tenants and mortgagee consented to such a dedication and there was a period in receivership when no-one had capacity to dedicate.
- Taking these factors together, there are other possible explanations for the public use other than the creation of a right of way. At common law, the mere existence of other possible explanations suffices to prevent any inference of dedication.

The recommendation, based on the investigation was for the committee to decline to make an order to add Long Row to the Definitive Map & Statement.

Members were invited to discuss the report. A Member asked why the review was carried out by a 3rd party and why an initial report indicated that the route should be added to the Definitive Map & Statement . The officer advised that the report was outsourced due to resource issues within the team and that the initial recommendation was based on initial review which was published with the aim of obtaining more evidence.

Another member enquired why the 91 people who had stated they used the route for walking were not interviewed, Bearing in mind that the recommendation not to add the route to the definitive map was based on the evidence of 3

persons. The member noted again that there was significant concern that the voice of the public seemed to have been disregarded. That member was also unclear as to why the England Coast Path route was not a relevant consideration.

Another member considered that erection of a security fence alone did not constitute an act of 'blocking'. The purpose of that fence had been to protect a building site. They were in favour of adding the route to the definitive map as the fence had been removed following the completion of works and the route had become a public right of way under common law.,

The officer advised in response that erection of a fence as matter of law removed access to part of the route the subject of the application.

Another member noted that while evidence from residents had been provided in support of the application, it also appeared that there had been an exercise undertaken of letters of support being sought from residents due to similarities in the wording of support letters which meant the recollection of residents may not have been accurate..

It was also noted that while the public feeling was understood, the report highlighted that there was not evidence of 20-years use, noted in item 8.2, and as per the training provided to committee members, they were bound by law and process when making their decision.

A member asked why access was sporadically allowed at times in the past, if there had been no intention for the path to be a public right of way and highlighted their concern about this.

It was raised by a Member that issues such as this have come up over time and that in this instance, designating the path would affect private land belonging to homeowners along the route..

A Member raised a point that the fencing used was a type of temporary fencing, indicating that the route would be reopened at some point, and that evidence regarding dates was vague.

Another member also raised the point that while the 20-year criteria was not met in full, the path still existed, but with diversions, so should be taken under consideration based on this. It was also queried why the coastal path from natural England had been disregarded.

The officer advised that the definition of a route for the England Coast Path did not create a public right of way, which was a separate legal issue.

Cllr Kilgour moved that the application be declined, Cllr Leask seconded this.

A vote was carried out with 6 for the application to be declined and 6 against. This meant the Chair had to use their casting vote, which was used in support of the application being declined. There were no abstentions.

The application was declined by a vote of 7 for to 6 against.

The chair noted when casting their vote, that they did so based on the officer recommendation reflecting the need for any decision to be based on the assessment of evidence against the legal tests . A Member raised their concern that the Chair was then implying that those who had voted against the recommendation were advocating unlawful decision-making. The Chair clarified that this wasn't the case.

5. Schedule of Planning Appeals

Submitted: Report of the Director of Place and Communities.

The report contained a schedule of pending planning appeals, Andrew Inch also advised of another appeal that had been lodged since the papers had been completed, for Tinos Café. The Committee were advised of this as it had been a decision they had made. They were advised they would be updated as and when the appeal had been completed.

Resolved: That the report be noted.

6. Chairman's Urgent Items

The Chair noted there were no urgent items.

APPENDIX 2

South Tyneside Council

PLANNING COMMITTEE 27 AUGUST 2024

ITEM 5 – CHAIRPERSON'S URGENT ITEM

Relating to a non-determination appeal for the following planning application

LPA Ref.	ST/0838/23/VC
Location:	Former Brigham and Cowan Dock 4 Entrance, Long Row, South Shields
Proposal:	Installation of floating pontoon and wave break, with access ladder. (Application under section 73 of the Town and Country Planning Act 1990, requesting a variation to the wording of condition 6 of previously approved planning application ST/0353/20/FUL - to allow for the mooring of safety vessel(s) or those engaged in educational use, in addition to the mooring of recreational leisure boats already permitted).

Background

1. The above planning application was subject to consideration by Planning Committee on 17 June 2024.
2. A copy of the officer report to that committee on this application is appended. In summary, it was recommended by officers that planning permission be granted subject to the suggested conditions included in the report.
3. Planning Committee following its debate on the application, and as set out in the minutes (also appended) voted to defer its decision on the application until a final decision had been reached on the Long Row Definitive Map Modification Order [DMMO] application. Members will recall, that the DMMO application was subsequently considered by Planning Committee on the 15 July with the committee resolving that the DMMO application be refused. That decision may now be the subject of an appeal.
4. Returning to planning application reference ST/0838/23/VC, as this was not decided within the statutory timescale (which expired on 17 June 2024), the applicant has submitted a non-determination appeal to the Planning Inspectorate.
5. The Planning Inspectorate has accepted that appeal, with its start date being 7 August 2024 and their appeal reference for it is APP/A4520/W/24/3349402.
6. The lodging of this appeal means that the decision on whether or not planning application ST/0838/23/VC is granted planning permission has been transferred from the Council to the Planning Inspectorate and the Council must comply with the appeal process now underway.
7. As part of the appeal process the Council must submit its appeal statement to the Planning Inspectorate by no later than 11 September 2024 setting out its views on the application, and it must also separately supply by the same date a list of suggested planning conditions if the appeal were to be allowed.

URGENT ITEM - Planning Committee 27 August 2024

8. The above-mentioned appeal statement needs to include commentary on what stance the Planning Committee would have taken on this application, if they were still able to decide it - i.e. would Planning Committee have been minded to grant planning permission (and subject to what conditions, if any) or to refuse it (and for what reason[s]).

Recommendation

9. Planning Committee are invited to decide, in the context of what is set out above in this report and the appended documents, if they would have approved or refused planning permission in respect of planning application reference ST/0838/23/VC. If committee resolve that they would have granted planning permission, then they are invited to advise on what conditions they would have attached to any such permission. If committee resolve that they would have refused planning permission, then they are invited to advise on their reasons for doing so and also to advise on what conditions should be attached to a grant of planning permission should the Planning Inspectorate decide to allow the appeal.