

APPENDIX

Item No.	Classification: Open	Date: October 26 2006	To: Director of Regeneration Cc Chief Executive
Report title:		45 Urlwin Street Planning Decision: Potential challenge to Secretary of State's decision	
Ward(s) or groups affected:		Camberwell Green Ward	
From:		Acting Borough Solicitor and Head of Development Control	

1. The Director of Regeneration is asked to decide whether to proceed with a challenge under s288 of the Town and Country Planning Act 1990 taking account of the factors set out in this report including:
 - a. Correspondence received from Councillor John Friary.
 - b. The line of argument on which the challenge might be based.
 - c. The likelihood of success of such a challenge
 - d. The potential outcomes if a challenge were successful
 - e. The wider impact of this decision on the implementation of planning policy and decision making.

RECOMMENDATIONS

2. It is recommended not to pursue an appeal under s288 of the Town and Country Planning Act, 1990, in respect of the Inspector's decision for 45 Urlwin Street (APP/5840/A/06/2013946).
3. Given the factors mentioned in this report, it is recommended that the Strategic Director of Regeneration takes urgent action to ensure the procedural failings that occurred in relation to the conduct of this appeal do not arise again.

BACKGROUND INFORMATION

The Scheme and Planning History

4. On September 11 2006, an Inspector, appointed by the Secretary of State issued his decision letter allowing an appeal for the redevelopment of 45 Urlwin Street, SE5.
5. The appeal relates to the demolition of part of an existing single-storey workshop building and the subsequent erection of a five-storey building to provide 22 flats and one commercial B1 unit. The appeal was for non-determination of a planning application by the council within the prescribed period. As such, following the appeal being lodged the council was no longer empowered to make a determination. A report was, however, submitted to the Planning Committee on April 27. The Officers' recommendation was to grant planning permission but the Committee members resolved to refuse permission for reasons of excessive density and also the considered effect on the nearby Grosvenor Park Conservation Area.
6. The Inspector made his site visit on August 1 and the appeal was determined by means of the written representations procedure.

Summary of the Inspector's Decision

7. The Inspector considered the main issue to be the effect of the proposed building on the character or appearance of the conservation Area, with particular reference to height, bulk and residential density. In his assessment he concluded that the proposed development would not have a significantly adverse effect on the setting of the conservation area or on views into or out of it and, therefore, that its character and appearance would be preserved. He also considered that the proposal would not materially harm the setting of the listed buildings in the vicinity, both inside and outside the conservation area, bearing in mind its distance from them, and therefore that the setting of such buildings would be preserved. He was also of the opinion that the proposed development, although car-free, would not result in significant local parking difficulties and would promote more sustainable travel choices in line with central government guidance. Lack of on-site parking provision, he stated, would also make more efficient use of the building for housing purposes.
8. Planning permission was granted subject to conditions and a S106 unilateral undertaking which provides that all the residential units be provided as intermediate affordable housing, and monetary contributions towards two on-street parking bays for disabled persons and a review of the Controlled Parking Zone in the area, whilst ensuring that future occupiers of the approved development would not be entitled (unless they are disabled persons' badge holders) to a residents' parking permit if a Controlled Parking Zone is implemented in the vicinity.

Procedural issues

9. The case officer, following Planning Committee having resolved that the council would have refused planning permission had the council retained the right of determination, failed to amplify Members' reasons in that no written statement was submitted to the Planning Inspectorate in this regard. The Inspectorate received from the council the statutory questionnaire and relevant policy extracts from the Southwark Plan (Revised Draft version), February 2005 upon the appeal being lodged and, subsequently, only the Committee Report and the minutes of the Planning Committee meeting.
10. The failure to submit a statement pursuant to the committee resolution was subsequently compounded in that the appointed Inspector was not made aware of an important change in local planning policy on June 29 when the Council's Executive resolved to adopt the Southwark Plan 2006 (Modifications version) for development control purposes. This latest post-Inquiry version of the replacement Unitary Development Plan, now one step from formal adoption, contained a rewording of a policy pertinent to the appeal proposal. UDP Policy 1.5, concerned with the Loss of Employment Floorspace had, in its previous form, considered certain proposals acceptable in the event that the development scheme retained 30% of all such floorspace. However, following the UDP Inquiry Inspector's findings the Policy wording was strengthened to read that the proposal would not result in a net loss of such floorspace.
11. Advice was sought from the Acting Borough Solicitor on whether there were possible grounds for challenge in relation to this appeal as a result of a request from Councillor Friary to consider an appeal, given the failure of the planning officers to actively defend the decision of members in relation to the development. Councillor Friary's correspondence with the Acting Borough Solicitor is attached as Appendix A.
12. Legal advice has been sought on the possibility of an appeal by way of a S288 challenge to the High Court. This advice is attached as appendix B and C to the closed report and includes advice from counsel.

KEY ISSUES FOR CONSIDERATION

Main objection to the Secretary of State's decision

13. The concern is not that the decision has gone against the council's position. This may happen whenever an Inspector or the Secretary of State considers an appeal. However, an Inspector is bound to take into account all current material policies on the date that he determines the appeal. In this instance, the Inspector did not receive the revised policy extracts. The proposed development does not comply with the provisions of revised policy 1.5 and, had it been in effect at the time the case officer prepared his committee report, the officer's recommendation would likely have been to refuse planning permission on this basis.

14. The legal advice provided concluded that [in relation to the issues that were considered by the Inspector in his decision letter]; “the Inspector examined the relevant issues in what appears to be a balanced manner and, whilst he reaches a different conclusion to the Council, [*where the relevant issues that were considered related to impact on the nearby conservation area, related questions of height, bulk and density, and parking*] I do not believe that we could argue that his decision is unlawful. This is one of those cases where it is open to different decision makers to reach different conclusions on the same facts without either one being unreasonable or acting unlawfully.”
15. However, the legal advice went on to say that there was a ground for challenge of the decision regarding the failure by the Inspector to consider the change in policy, where this was never provided to the Inspector and was a relevant material consideration; “The Inspector needs to take account of all relevant material considerations at the time of his decision. In this case the Inspector dealing with the appeal was not informed of a new material consideration - the strengthened policy. Although the failure was the council's this may well form the basis for a challenge.” This advice is set out in Appendix B which appears on the closed report.
16. Given the assessment above, we sought further, more detailed advice from counsel on the merits of a potential appeal to the High Court under S288 of the Town and Country Planning Act 1990. This advice is set out in Appendix C which appears on the closed report.
17. The Strategic Director of Regeneration should consider the legal advice together with the factors mentioned below in deciding whether it is expedient to appeal to the High Court.
18. It would be possible to formulate a modified planning application with amendments so as to bring the proposal to accord with Policy 1.5 (as revised), involving no net loss of employment floorspace. This could be achieved without having to increase the approved building's footprint, thereby reducing the proposed communal garden area or, alternatively, having to raise the height of the building to six storeys. The latter approach has already been discounted by officers, having been put forward by the developers as a pilot scheme prior to submission of the application allowed on appeal. Given, therefore, that the revisions would only require a reconfiguration of the internal residential/commercial floorspace split there would be no necessity to alter the physical form of the five storey building allowed by the Inspector. Its height, bulk and massing would not change.
19. The views of the Planning Committee, in resolving that planning permission would have been refused for the proposed five-storey building, are paramount. Members considered that the development would be unacceptable on two separate issues; firstly, the scheme's high density and secondly, the considered adverse affect on the conservation area west of the railway viaduct. The Inspector, however, in disagreeing with these views has given a firm steer as to the site's development potential. He also accepted that a car-free development was workable and that the proposed commercial

element could be satisfactorily serviced from the kerbside. This arrangement would equally apply to any modified scheme.

20. On the basis of the above, it is considered that a revised proposal, modified to accord with current policy would not ameliorate any perceived impact occasioned to neighbouring occupiers. Accordingly, challenging the Inspector's decision would not prevent the site being redeveloped in the manner described.
21. It is to be noted there are a number of pre-implementation planning conditions that have not been approved and therefore the Developer will not have been able to implement the permission contained in the appeal decision letter. There are no pending applications in this regard.
22. It is also open to the appellant to propose a modification to the scheme incorporating further commercial space during the period before a challenge is heard. They could also do so immediately after a successful challenge or at the time the Inspector reconsidered the case.
23. Officers acknowledge it could be considered expedient for the promotion or protection of the interests of the inhabitants of the area in actively pursuing this appeal given that there was a failure by officers to actively support Members' decision on a planning appeal and a failure by officers to advise the Inspector of changes to relevant planning policies. A pursuit of an appeal would show that the council was doing all it could to remedy the earlier procedural flaws. However, given counsel's advice and the likely conclusions of even a successful appeal and the costs involved, it is the officer view that it is not expedient to pursue an appeal under S288 in this instance.

Process of Challenge

24. In this case, any challenge would be made to the High Court under S288 of the Town and Country Planning Act 1990. Making an application for review of the decision is strictly time limited and had to be made by October 23 2006. The Director is advised that an application under S288 in the High Court has been filed at the High Court in order to protect the council's position while this decision was made. Leave to appeal is not required and a substantive hearing might take place within six months.
25. The Inspector is not empowered to withdraw the decision, but would be required to reconsider the decision if an appeal to the High Court was successful and the decision was quashed. Such reconsideration is likely to concentrate on points that the court might raise about the failure to take into account a material planning consideration in the form of the revised policy. The court has no jurisdiction to consider the planning merits of the case as part of the challenge.

Arguments for and assessment of grounds of challenge

26. These are set out in full in the closed report. They deal with the likely outcome of a challenge given the council's failure to submit a written statement on appeal or provide an update on policy changes as the appeal progressed. The court is not obliged to quash the inspector's decision, even if it finds in the council's favour.

Costs associated with challenge

27. There are costs involved in any such challenge in the High Court. These could be in the region of £50,000 in total (£10,000 for the council). It is possible that the Secretary of State could submit to the decision being quashed given that the change in policy was not brought to his attention and it is a relevant material consideration but this seems unlikely. In any event, the developer has the right to be heard by the court. Even if successful, the council will undoubtedly be ordered to pay the costs of both the Secretary of State and the developer given that the appeal has arisen through the council's own fault.
28. Further, if the decision is quashed and a fresh inquiry held, the developer could request that the council pay the costs of the rehearing because the rehearing is only necessary as a result of the council's actions. Costs orders on an inquiry are rare and are only awarded where there has been unreasonable conduct by one of the parties. It seems likely that such an order would be made against the council in this case (although it is not possible to estimate the amount involved at this stage).

COMMUNITY IMPACT STATEMENT

29. In line with the council's community impact statement the impact of the possible outcome of a successful challenge has been assessed:
30. As mentioned in this report, in the event of a successful challenge and the decision being quashed, the Inspector in reassessing the scheme may consider that planning permission should not be granted. This would then allow for a resubmitted proposal showing a building of identical form, bulk, height and massing but with a greater degree of commercial floorspace. In view of the Inspector's assessment of the development in his recent decision letter such a scheme would be difficult to resist, yet the physical impact of either building would be identical. Accordingly, objectors to the development in principle would receive no benefit from such an outcome.
31. Finally, the failure of officers to actively support the Planning Committee's decision has the potential to erode the community's confidence in the planning process and undermine local democracy and involvement in planning matters.

Consultation

32. No additional external consultation has been undertaken on this issue given its nature.

SUPPLEMENTARY ADVICE FROM OTHER OFFICERS

Borough Solicitor

33. The Acting Borough Solicitor has approved the contents of the report overall.

Finance Director

34. The costs of appealing will need to be contained within existing budget provision set aside by the Strategic Director for Regeneration for such support. The costs implications are dealt with in the body of the report.

FOR DELEGATED APPROVAL

Under the powers delegated to me in accordance with the Council's Constitution, I authorise action in accordance with the recommendations contained in the above report.

Signature Date

Designation: Paul Evans, Strategic Director of Regeneration

APPENDICES

No.	Title
Appendix A	Correspondence with Councillor John Friary

AUDIT TRAIL

Lead Officer	Glen Egan	
Report Author	Tim King and Ellen FitzGerald	
Version	Final	
Dated	03/11/06	
Key Decision?	Yes	
<i>CONSULTATION WITH OTHER OFFICERS / DIRECTORATES / EXECUTIVE MEMBER</i>		
Officer Title	Comments Sought	Comments included
Borough Solicitor	Yes	Yes
Finance Director	Yes	Yes
Date final report sent to Constitutional/Community Council/Scrutiny Team	03/11/06	