

CARLISLE CITY COUNCIL

Report to:- **Carlisle City Council**

Date of Meeting:- **13 September 2011**

Agenda Item No:-

Public

Title:- **CARLISLE AIRPORT: AUDIT COMMISSION REPORT**

Report of:- **Assistant Director (Governance)**

Report reference:- **GD55/11**

Summary:-

In August 2010 a local government elector made an objection to the Council's 2009/10 accounts under section 16 of the Audit Commission Act 1998. Accordingly, the external auditor appointed by the Audit Commission conducted an investigation. Appendix 1 to this report is the Audit Commission summary of the investigation report. Appendix 2 is the Council's recommended action plan in response. The detailed investigation report is in Part B of the Meeting Agenda.

Recommendation:-

It is recommended that Council:

1. Receive the Audit Commission Report;
2. Approve the Action Plan (Appendix 2);
3. Refer the Audit Commission Reports to the Audit Committee for further consideration and instruct the said Committee to monitor the implementation of the recommendations in the Action Plan.

Contact Officer: Mark Lambert

Ext: 7019

01 September 2011

Note: in compliance with section 100d of the Local Government (Access to Information) Act 1985 the report has been prepared in part from the following papers: None

1. REASONS FOR RECOMMENDATIONS

To ensure that the Council properly acknowledges the Audit Commission report and acts upon the recommendations contained therein.

2. IMPLICATIONS

- Staffing/Resources – Council Officers and Members will have to take ownership of the actions recommended by the Audit Commission.
- Financial – There are no direct financial costs from the reports, however, procedural errors can have such implications for the Council.
- Legal – The recommendations in the Reports, allied to the related Action Plan, serve to reinforce the decision making process within the Council helping to ensure that the authority's decisions are properly taken, reasonable and take into account relevant matters and disregarding irrelevant ones.
- Corporate – As per the legal comments.
- Risk Management – Proper decision making protects against, or reduces the risk of, the Council's decisions being challenged.
- Equality and Disability – none.
- Environmental – none.
- Crime and Disorder – none.
- Impact on Customers –

Impact assessments

Does the change have an impact on the following?

Equality Impact Screening	Impact Yes/No?	Is the impact positive or negative?
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Does the policy/service impact on the following?		
Age	No	
Disability	No	
Race	No	
Gender/ Transgender	No	
Sexual Orientation	No	
Religion or belief	No	
Human Rights	No	
Health inequalities	No	
Rurality	No	

If you consider there is either no impact or no negative impact, please give reasons:

The recommendations in the Reports do not change any Council policy or service to any of its Customers.

If an equality Impact is necessary, please contact the P&P team.

Airport planning application

Carlisle City Council

Audit 2009/10

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We also help public bodies manage the financial challenges they face by providing authoritative, unbiased, evidence-based analysis and advice.

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Summary report

Introduction

- 1 I am the external auditor appointed by the Audit Commission to audit the accounts of Carlisle City Council (the Council) for the financial year ended 31 March 2010.
- 2 Since November 2008 several local electors have raised concerns with me in correspondence about:
 - the lease agreement between the Council and the operator of Carlisle Airport;
 - the Council's handling of a planning application relating to the airport in the 2008/09 financial year; and
 - the Council's decision in May 2009 to contest a judicial review, which it eventually lost, of the grant of planning permission.
- 3 In August 2010 a local government elector made an objection to the Council's 2009/10 accounts under Section 16 of the Audit Commission Act 1998 (the Act). The objector asked me to:
 - make an application to the court under section 17 of the Act to confirm that an item of account is unlawful and to order rectification of the accounts; and
 - issue a report in the public interest under section 8 of the Act to bring the matter to the attention of the public.

Background

- 4 The objection concerns costs estimated by the objector at £0.25 million incurred by the Council in preparing for and unsuccessfully contesting a judicial review of a planning decision taken in December 2008.
- 5 The substance of the objection is that the Council acted unlawfully over a planning application for development at Carlisle Airport and then contested:

“a judicial review in the face of legal advice to the contrary.”

The objector asserted that this was:

“a serious misuse of public funds by a Council who have succumbed to bullying of a developer and ignored the duties to the tax-paying public.”

- 6 By way of background, in October 2007 the developer - a major employer in Carlisle and Cumbria - made the first planning application for development at Carlisle Airport.

7 In April 2008 the Council's Development Control Committee (DCC) resolved to refer the application to the Secretary of State as a Departure from the Development Plan. A Departure is a proposed development that is not in accordance with a local plan, but which due to exceptional circumstances the local planning authority proposes to accept.

8 In June 2008 the Secretary of State called in the airport application so it could be considered at a Public Inquiry. In July 2008 the developer chose to withdraw the application. The Public Inquiry did not go ahead.

9 In October 2008 the developer put in a second application for a smaller scale development at Carlisle Airport. Unlike the first application, the second included no airside works relating to, for example, the runway or a passenger terminal.

10 On 19 December 2008 the Council's DCC gave the Head of Planning and Housing Services authority to issue approval for the proposal, subject to completion of a Section 106 Agreement on future airside works. A Section 106 Agreement is a binding agreement between a council and a developer associated with a grant of planning permission and regarding matters linked to the proposed development. Both parties signed an agreement and the Council granted planning permission on 12 March 2009.

11 Solicitors acting for Mr G Brown issued Judicial Review proceedings in April 2009 to overturn the planning approval granted by the Council. On 1 May 2009 the DCC decided the Council would contest the Judicial Review. The Council's defence was twice successful in the High Court in June and October 2009, but in December 2009 Mr Brown was given permission to appeal. On 19 May 2010 Mr Brown succeeded in having the planning permission quashed in the Court of Appeal.

12 The Council was ordered to pay Mr Brown's costs, which were eventually agreed at £105,000. In addition the Council incurred:

- its own external legal costs, such as advice from Counsel and representation in Court, which it has quantified as £80,460 excluding VAT; and
- in-house costs, such as the costs of legal and other officers' time.

13 In reviewing the matters raised by the objection, I considered it necessary to look also at the way in which the Council dealt with the two planning applications it received in respect of the airport in my capacity as the Council's appointed auditor.

14 The Council has now received and is processing the developer's third application for development at Carlisle Airport. The aim of this report is to draw attention to defects in the Council's arrangements that I believe contributed to the situation outlined above and to seek to ensure that lessons are learned for major planning applications in the future.

Conclusions

15 In my view there is no unlawful item of account. A decision as to whether I should exercise my discretion to apply to the court for a declaration under section 17 of the Act does not therefore arise.

16 I have considered carefully whether I should issue a Report in the Public Interest under Section 8 of the Act. My view is that I should exercise my discretion not to issue a section 8 report, because the Council has agreed to publish this audit report, consider it at a full Council meeting on 13 September 2011 and publish its response to my findings and recommendations in the form of an action plan.

17 I have summarised my overall conclusions below.

Overall conclusion

18 The Court of Appeal determined that the Council made a wrong planning decision. That is not a matter for my audit, unless the Council did so wilfully or reached a decision that was so unreasonable that no reasonable body could have made it. I do not believe that is the case based on the evidence I have seen - both in relation to the planning decision itself and to the decision to contest the subsequent judicial review.

19 However, I do believe that mistakes were made when the two applications relating to the airport redevelopment were received and that there are lessons to be learned for the management of future major planning applications.

The separation of planning and economic development considerations

20 The Chief Executive is responsible for leading and directing operations in accordance with the Council's policies and objectives. In doing so, she works to the Leader. As such, she is chief executive of the local planning authority and has a responsibility for the proper oversight of both economic development and development control activities. It is entirely appropriate for her to maintain oversight of development control matters. But at times there can be tensions between the dual roles for:

- economic development, championing the local economy; and
- development control, where as local planning authority the Council must act impartially and objectively within a statutory and policy framework.

21 The two airport applications have both been high profile and attracted much press coverage. There were some perceptions both within and outside the Council that there may have been a blurring of the Council's economic development ambitions and its regulatory planning role.

22 In fact, my review has confirmed that senior officers are aware of the Council's separate roles in economic development and planning. Indeed there is evidence that they stressed this to the developer and that, as a result, relations between the developer and Council were, at times, adversarial and not indicative of a cosy relationship. For example, the Council did refer the first application as a Departure as a consequence of which it was called in.

23 However, I have also found evidence that, at times, officers and members did not demonstrate the distinction between these roles in the way they behaved. This contributed to perceptions in some quarters, illustrated in a formal complaint from a member of the public, that the Council was compromising its regulatory planning role. For example:

- during the first application some members of the DCC seemingly felt the Chief Executive had been "*pushing*" the developer's case;
- the Council Leader was pictured in local newspapers shaking hands with the developer's Chief Executive immediately after a meeting to negotiate planning conditions; and
- the Chief Executive exerted pressure on planning officers which she has stressed to me was intended only to accelerate the planning process, in respect of the timing of the reports and to encourage officers to be more effective, but which was interpreted by them as her seeking to influence the outcome.

24 I also question if it was advisable for the Council Chief Executive to accept an invitation from the Chief Executive of North West Development Agency (NWDA) to chair a stakeholder meeting in July 2008, accompanied by the Council Leader, at which the developer's planning intentions and timescales were discussed. This meeting was attended by representatives from a range of stakeholders including the NWDA, Government Office for the North West (GONW), Cumbria County Council, Cumbria Vision and others. Chairing such meetings can be a key part of the local authority chief executive role, but having already encountered perceptions that she was "*pushing*" the airport case to the detriment of planning considerations, more caution might have been exercised.

Managing the consideration of significant planning applications

25 Whilst I have found no evidence of bias in the final decisions taken by the Council, there are aspects of the handling of these high profile applications which may have undermined public confidence in the Council. There is a need to put in place added safeguards to protect the Council's reputation when handling major planning applications in the future.

26 The Chief Executive has described the airport redevelopment as a "*once in a lifetime*" scheme for the area which was consistent with regional, sub-regional and Council economic strategies. This reflects not just the scale of the applications but:

- the potential economic benefits to Carlisle of airport development;

- the possible consequences if the scheme did not proceed. Officers believed there was a genuine risk that the developer - the main employer and investor in the city - might leave Carlisle; and
- the level of public and media interest.

27 Despite this, when the first application was submitted in October 2007, no special arrangements were put in place by the Council to ensure that such a complex application could be handled within a reasonable timeframe or to demonstrate that the Council's economic development interests would not affect its planning responsibilities for such a "*once in a lifetime*" opportunity.

28 The Chief Executive has told me she became concerned in early 2008 that the planning application was not being handled well by the Council and Government targets were likely to be missed. She was aware the developer was becoming concerned about progress and there was a growing public perception that the application "*had the potential to drift on*". She told me she offered additional resources to the planning team, but this offer was declined. However, planning officers have told me they had concerns about the difficulties they had in getting information from the developer necessary to process the application. They could not recall any offer of additional support.

29 Once it was clear that the first application would not be ready for a decision to be made at the 15 February 2008 DCC meeting, the Chief Executive became involved. She discussed the way forward with the Director of Development Services and the Head of Planning and Housing Services and it was agreed that the application would go to the DCC on 28 March 2008. This is highly unusual because the Director of Development Services and the Head of Planning and Housing Services apparently did not consult:

- the Chair of the DCC about the date of this meeting; or
- the Development Control Manager, who was responsible for managing the application. He has said subsequently that he would have preferred more time so that all information received could have been considered and included in his report.

30 The Chief Executive has told me that her personal circumstances in the spring of 2008 meant that at times her involvement often had to be by telephone, in less than ideal circumstances, which made effective management and communication difficult.

31 In the event, the DCC was unable to determine the application on 28 March 2008 because some information requested from the developer had been received only in the previous day or so. As a result, the conditions attached to the application were likely to need rewording. The DCC met again on 4 April 2008, but was again unable to approve the application. At the next meeting, 25 April 2008, the application was approved as a Departure from the Development Plan. It was called in by the Secretary of State in June 2008 for consideration at a public inquiry. It was subsequently withdrawn by the developer.

32 The developer's stated preference to have the second airport application considered at the December 2008 DCC meeting, which was comfortably within the relevant Government target, contributed to the pressure on planning officers dealing with that application. It was clear that the Chief Executive was committed to working within the developer's desired timescales which she believed were entirely reasonable. I can understand the Development Control Manager's perception that the Chief Executive, by saying she would write the planning report herself, added to those pressures. There is conflicting evidence about what else the Chief Executive may have said to planning officers.

33 Such pressures contributed to the Development Control Manager's statement that he deliberately worded the Officer's Report in an unusual and non-committal way, because he was professionally unhappy with the situation he found himself in.

34 It is now clear that the Chief Executive had some concerns about the way in which planning officers handled these applications. However, I note that these concerns did not lead to any consideration of performance or conduct in line with the Council's HR policies and performance management framework.

Obtaining legal advice

35 The Council obtained Counsel's opinions in September and November 2008 in respect of the second airport planning application.

- The first opinion addressed whether an Environmental Impact Assessment (EIA, which evaluates the likely environmental impacts of a development and is required in relation to certain types of development projects specified in legislation) was necessary and whether it must include the future airside works. Counsel's advice that the Council needed to give this proper consideration was not acted upon fully. The rationale for eventually accepting a two-stage approach to the EIA, under which environmental assessment of the airside works was deferred to a possible later stage, was not documented at the time. The Officer's Report and the DCC meeting failed to address the issue, despite the Council's position being challenged by Mr Brown's solicitor and another member of the public. These failures were subsequently critical to the outcome of the Judicial Review.
- The second opinion considered whether a Section 106 Agreement was a suitable mechanism for ensuring that the airside works, which the Council was in favour of, came to fruition. Counsel accepted it could be in principle, but on the evidence he saw, which included draft Heads of Terms for the Section 106 Agreement, was not satisfied that all the tests were met. Officers did not consult Counsel again on that issue.

36 In my view, in both instances it would have been advisable to consult Counsel again as the application progressed and the Section 106 agreement was fleshed out. It would also have been appropriate to brief DCC members more fully on Counsel's observations and how officers had addressed them. It is not clear to me that officers ensured that, in making their decision on the second application, members were able to take all relevant factors into account.

Contesting the Judicial Review

37 Faced with a Judicial Review application, the Council obtained clear advice from Counsel not to contest its alleged failure to assess the environmental impact of the airside development properly. Ultimately that advice proved to be correct in the Court of Appeal.

38 However, a combination of pressure from the developer, whose two legal advisers contradicted the Council's one, and the intervention of the Chief Executive and Council Leader, who discussed their concerns with the Head of Legal Services, led the Council to seek a second opinion at a late stage. I accept that was a reasonable action to take. The second opinion, from another specialist in planning law, contradicted the Council's first one and said the Council had grounds to resist the judicial review.

39 The Council now had two Counsels' opinions that differed starkly on the prospects of successfully defending the grant of planning permission. It is my view that when the DCC met to decide whether to contest the Judicial Review, members took too little time to read legal documents that were tabled. However, a barrister and the Head of Legal Services explained the Council's two legal opinions and the associated risks of each in a balanced way - if anything, they erred towards not defending the claim.

40 I conclude therefore that members were properly appraised of the issues and risks of the two courses of action open to them in respect of the application for Judicial Review. In reaching their decision, DCC members took account of the Council's economic development aims, which does not seem to me unreasonable. However, they also took account of the interests of the developer. In my view, members afforded too much weight to the developer's reduced prospects of defending the Judicial Review without the Council standing alongside.

41 That the Council successfully defended its position twice in the High Court demonstrates the legal arguments that eventually prevailed in the Court of Appeal were finely balanced. I do not therefore accept the objector's argument that the Council unreasonably committed "*a serious misuse of public funds... and ignored the duties to the tax-paying public*".

42 On the balance of the evidence available to me, I do not believe the decision to contest the Judicial Review was an unreasonable exercise of the Council's discretion. It is, however, true that had the Council:

- accepted the clear advice of its first Counsel, rather than seeking a second opinion at a late stage under pressure from the developer; and
- examined the arguments put to it by Mr Brown's solicitors and a member of the public before granting planning permission on 19 December 2008:

it could have avoided incurring its own and Mr Brown's legal costs in contesting his application for Judicial Review.

The role of members

43 There is no evidence that the outcome of the December 2008 DCC meeting was predetermined. However, I am surprised that members:

- asked just two questions of Council officers about the second application, despite its complexity and high-profile;
- failed to pick up on the EIA issue, despite receiving representations on it from a member of the public and Mr Brown's solicitor; and
- did not query the non-committal wording used in the Officer's Report which deliberately stopped short of a clear recommendation to members.

44 Members of the Committee have told me that training for DCC members could be improved.

45 With regard to their decision whether to contest the Judicial Review, whilst I consider the decision itself was reasonable, I am concerned that DCC members:

- took insufficient time to read documents which were tabled at the start of the meeting on 1 May 2009; and
- took account of factors that were not directly relevant to the decision they needed to make.

Next steps

46 The Council now needs to consider carefully the issues I have raised in this report and my recommendations that I have summarised below. It then needs to agree the detailed actions needed in response and oversee their implementation. I intend to review the progress made as part of my current audit.

Summary of recommendations

R1 Strengthen arrangements for safeguarding and demonstrating the integrity and transparency of the regulatory planning process and ensuring it is not unduly influenced by economic development aspirations.

Summary of recommendations

- R2** Ensure that planning applications do not proceed to committee stage until supported by the information that planning officers require to properly report the matter to members.
 - R3** Ensure that where legal advice identifies issues requiring resolution, such issues are demonstrably resolved. This may involve seeking further legal advice to confirm the adequacy of actions taken.
 - R4** Ensure that reports to Committee are clear on the nature of legal advice obtained and actions taken as a result.
 - R5** Review the existing "Members Planning Code of Good Practice" to ensure it adequately covers the requirements on officers. This will ensure that Planning Officer Reports include a clear recommendation or, exceptionally, clarify why no recommendation has been possible.
 - R6** Ensure important professional planning judgements receive sufficient attention and are adequately documented on a timely basis.
 - R7** Review the provision of specialised training for members of the Council's Development Control Committee and other committees that fulfil specific statutory roles.
 - R8** Ensure that where independent legal advice is required it is obtained on a timely basis, including any requirement for a second opinion.
 - R9** Avoid tabling important documents in Committee meetings. If, exceptionally, documents cannot be circulated in advance members must take sufficient time to properly read and consider all new information.
 - R10** Ensure that decisions only take into account relevant considerations and do not, for example, afford undue weight to the interests of third parties.
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Appendix 2 Action Plan

Recommendations

Recommendation 1

Strengthen arrangements for safeguarding and demonstrating the integrity and transparency of the regulatory planning process and ensuring it is not unduly influenced by economic development aspirations.

Responsibility	Strategic Director and Assistant Director (Economic Development)
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Priority	High
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Date	Immediately
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Comments

Recommendation 2

Ensure that planning applications do not proceed to committee stage until supported by the information that planning officers require to properly report the matter to members.

Responsibility	Assistant Director (Economic Development) and Planning Manager
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Priority	High
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Date	Immediately
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Comments	Planning Officers should feel confident that they have sufficient information upon which to base a judgement. However, it will still be necessary to make certain recommendations on a “subject to” basis where, perhaps, consultation responses are still awaited. This recommendation will strengthen the Council’s position opposite applicants to require them to submit required information by specified dates. Of course, matters may have to be reported to Members taking into account the fact that applicants have failed to supply required information.
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Recommendation 3

Ensure that where legal advice identifies issues requiring resolution, such issues are demonstrably resolved. This may involve seeking further legal advice to confirm the adequacy of actions taken.

Responsibility	Assistant Director (Governance) and Legal Services Manager
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Priority	High
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Date	Immediately
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Comments

Recommendation 4

Ensure that reports to Committee are clear on the nature of legal advice obtained and actions taken

as a result.

Responsibility	Assistant Director (Governance) and Legal Services Manager
Priority	High
Date	Immediately
Comments	The legal advice will be relevant to the determination of the planning application in question.

Recommendation 5

Review the existing "Members Planning Code of Good Practice" to ensure it adequately covers the requirements on officers. This will ensure that Planning Officer Reports include a clear recommendation or, exceptionally, clarify why no recommendation has been possible.

Responsibility	Assistant Director (Economic Development) and Planning Manager
Priority	Low
Date	February 2012
Comments	The Members' planning code relates to Members and the planning officers have to comply with their professional code of practice from the Royal Town Planning Institute. The Code will be reviewed so that Members are able to understand exactly what they should expect from their Officers.

Recommendation 6

Ensure important professional planning judgements receive sufficient attention and are adequately documented on a timely basis.

Responsibility	Assistant Director (Economic Development) and Planning Manager
Priority	High
Date	Immediately
Comments	

Recommendation 7

Review the provision of specialised training for members of the Council's Development Control Committee and other committees that fulfil specific statutory roles.

Responsibility	Assistant Director (Governance)
Priority	High
Date	Completed
Comments	All Members of the Council's quasi-judicial committees receive training before they are able to participate in Meetings. Specifically in relation to Development Control Committee, this has been in place for several years and refresher training has been offered on an annual basis to more experienced members. Recently, the Council's Assistant Director (Economic Development) and Legal Services Manager have provided additional, more focussed, training sessions for DC Members.

Recommendation 8

Ensure that where independent legal advice is required it is obtained on a timely basis, including any requirement for a second opinion.

Responsibility	Assistant Director (Governance)
Priority	High
Date	Immediately
Comments	There was no option other than to obtain the legal advice when it was given the timetable for the determination of the relevant application. However, the point is acknowledged that officers and Members must have sufficient time to digest advice given.

Recommendation 9

Avoid tabling important documents in Committee meetings. If, exceptionally, documents cannot be circulated in advance members must take sufficient time to properly read and consider all new information.

Responsibility	Chief Executive and Chairs of Committees
Priority	High
Date	Immediately
Comments	

Recommendation 10

Ensure that decisions only take into account relevant considerations and do not, for example, afford undue weight to the interests of third parties.

Responsibility	Chairs of Committees
Priority	High
Date	Immediately
Comments	Actual decisions should only take into account relevant considerations but Members are able to ask general questions when debating any particular topic.