

## APPENDIX 21

### MEMBERS' PROTOCOL ON PLANNING MATTERS

#### 1. Aim of Protocol

- 1.1 This Protocol applies to Members who are involved in the planning system
- 1.2 The role of an Elected Member on the Planning Committee involves balancing representation of the needs and interests of individual constituents and the community, with the need to maintain an ethic of impartial decision-making in the wider public interest on what can be highly controversial proposals. Planning decisions are based on balancing competing interests and making an informed judgement against a local and national policy framework. The decision-making process should be open and transparent
- 1.3 One of the key aims of the planning system is to balance private interests in the development of land against the wider public interest. In performing this role, planning necessarily affects land and property interests, particularly the financial value of landholdings and the quality of their settings
- 1.4 Opposing views are often strongly held by those involved. Whilst councillors must take account of these, they should not favour any person, company, group or locality, nor put themselves in a position where they may appear to be doing so. It is important, therefore, that planning authorities make planning decisions affecting these interests openly, impartially, with sound judgement and for justifiable reasons and in accordance with the statutory framework
- 1.5 The process should leave no grounds for suggesting that those participating in the decision were biased or that the decision itself was unlawful, irrational or procedurally improper
- 1.6 Whilst the determination of a planning application is not a 'quasi-judicial' process (unlike, say, certain licensing functions carried out by the Council), it is a formal administrative process involving the application of national and local policies, reference to legislation and case law as well as rules of procedure, rights of appeal and an expectation that people will act reasonably and fairly. All involved should remember the possibility that an aggrieved party may seek a Judicial Review and/or complain to the Local Government Ombudsman on grounds of maladministration or a breach of the Council's Members' Code of Conduct
- 1.7 The successful operation of the planning system relies on mutual trust and an understanding of Members' and officers' roles which are different but complementary. Both serve the public but Members are

responsible to the electorate, whilst officers are responsible to the Council as a whole. Officers advise Members and the Council and carry out the Council's work. They are employed by the Council, not by individual Members. Officers who are Chartered Town Planners are subject to the Royal Town Planning Institute's Code of Professional Conduct, breaches of which may be subject to disciplinary action by the Institute

1.8 The aim of the Protocol is to ensure that Members involved in Planning matters act in a way in which is not only fair and impartial but is also clearly seen to be so

1.9 This Protocol relates mainly to planning applications. The same principles are however applicable to other types of approvals sought under planning legislation and to the various kinds of enforcement action within the purview of the Planning Committee. It is also applicable to the development and approval of planning policy by Council.

## **2. Some Words of Caution**

2.1 The Protocol does not replace or supersede or override any duty or responsibility of a Member to declare an interest of any kind in accordance with the requirements of the Local Government Act 2000 (Section 81(1)), the Members' Code of Conduct set out in Appendix 18 of the Constitution, or in accordance with any current guidance. The Localism Act 2011 sets out a duty for each local authority to promote and maintain high standards of conduct by councillors and to adopt a local code of conduct (see paragraph 6.1 of Appendix 18 relating to disclosure of pecuniary interests)

2.2 In order to keep Members aware of matters within the scope of paragraph 2.1 above which may affect the operation of this Protocol, changes or new advice will be reported to Members as appropriate and the Protocol refreshed accordingly

2.3 The Protocol does not of itself authorise any departure from the requirements of the Council's Constitution or its Procedure Rules or Financial Regulations.

## **3. Training**

3.1 Training for all Members on the Planning Committee and their substitutes<sup>1</sup> is mandatory. In the event of a Member not attending at

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<sup>1</sup> The Council's Constitution (Appendix 9 Revised April 2015) states as follows

For every member of the Committee, there can be one substitute nominated.

Any Member who is due to miss a meeting should inform the Chair of the relevant Committee at least 24 hours before the Committee is due to meet (and that it is the Member concerned who does this)

At any one meeting, there should be no more than 2 substitutes per political grouping present

Training will be provided for nominated substitutes on regulatory committees

least two-thirds of any session of training events labelled as mandatory the Chair and Vice Chair of the Planning Committee are allowed to use their discretion in considering whether a Member can remain on the Committee with full voting rights<sup>2</sup>

- 3.2 Other Members of the Council are welcome to join the training sessions if they wish and there is spare capacity.

#### **4. Discussions with those proposing developments**

- 4.1 Early councillor engagement is nowadays encouraged to ensure that proposals for sustainable development can be harnessed to produce the settlements that communities need. Members of the Planning Committee and their substitutes should not, other than in the context of the Council's Strategic Planning Consultative Group or meetings organised by and attended by officers, normally be involved in discussions with an applicant for planning permission for any Major or Minor Development.<sup>3</sup> If Members are so involved, it will be on the basis that it must always be made clear at the outset of those discussions that they do not bind the Committee to making a particular decision, and that any views expressed by Members are personal and provisional. By the very nature of such meetings not all the relevant information may be at hand, nor will formal consultations with interested parties have taken place
- 4.2 Members are advised not to give advice on the development plan or material considerations as they may not be aware of all the issues at an early stage
- 4.3 Similarly Members should not become drawn into negotiations, which should be done by officers (keeping Members up to date) to ensure that the Council's position is co-ordinated
- 4.4 A written note of all such meetings will be made by the attending officer. A note will be taken of any phone conversations by the officer involved and relevant emails recorded for the pre-application enquiry file
- 4.5 Initially, until the issue of confidentiality has been clarified by the party making the enquiry and officers have determined whether or not there is a legitimate reason for confidentiality, Members involved in such

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Where a Planning Committee site visit is involved, substitutes will only be allowed to attend and vote at the relevant Planning Committee if they have been on the site visit

<sup>2</sup> Resolution of 23<sup>rd</sup> June 2009 Planning Committee Item No.148

<sup>3</sup> Major' applications are defined as those applications where 10 or more dwellings are to be constructed (or if the number is not given, the site area is more than 0.5 hectares), and, for all other uses, where the floor space proposed is 1000 square metres or more or the site area is 1 hectare or more.

'Minor' applications are those for developments which do not meet the criteria for 'Major' development nor the definitions of Change of Use or Householder Development

pre-application discussions should treat them on a confidential basis. Unless there is a legitimate reason for confidentiality concerning a proposal, there will be an expectation that records of such enquiries and discussions will be available as a matter of public record, particularly upon the submission of an application

- 4.6 Similar considerations will apply when the Council is considering its plan-making, particularly when making new site allocations in emerging development plans.

## **5. Site Visits**

- 5.1 The Planning Committee may resolve, when considering an application, to defer a decision on the application in order to undertake a site visit as a Committee. In such cases no decision relating to that application will be made before or during the course of the site visit; decisions on such matters will be taken by a subsequent meeting of the Committee
- 5.2 Site visits by the Committee are generally held where there is a clearly identified benefit to the Committee in enabling Members better to appreciate particularly contentious or complex proposals, and where the impact is difficult to visualise or assess from the submitted information and plans. The Member proposing at Committee a site visit should indicate the nature of such benefit. The reason(s) for the holding of the site visit shall be recorded in the minutes of the Committee<sup>4</sup>
- 5.3 If the Head of Planning so wishes he may bring to the Planning Committee, at a time when that application is not being considered, a proposal for the holding of a site visit by the Planning Committee
- 5.4 The site visit shall be undertaken in accordance with the Planning Committee's agreed site visit protocol which is attached to this Protocol<sup>5</sup>
- 5.5 The officer attending the site visit will take a formal list of Members in attendance at the formal opening of the site visit
- 5.6 Where a site visit has taken place, it will be referred to in the report to Committee
- 5.7 When an application that has been subject to a site visit is brought to the Planning Committee for determination, Members, including their substitutes, (see Appendix 9 of the Constitution, paragraph 4) who did not attend the site visit shall neither be eligible to take part in the debate concerning the item's determination nor shall they be eligible to vote upon that determination.<sup>6</sup>

## **6. Procedure at Meetings of the Planning Committee**

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<sup>4</sup> As resolved Planning Committee 1<sup>st</sup> April 2015

<sup>5</sup> Last revised 1<sup>st</sup> April 2015 Planning Committee

<sup>6</sup> As resolved Planning Committee 1<sup>st</sup> April 2015

It is paramount that any decision the Committee reaches must be reached fairly and impartially and is seen to be so

6.1 *Registration and disclosure of interests*

Chapter 7 of the 2011 Localism Act places requirements on councillors regarding the registration and disclosure of their pecuniary interests and the consequences for a councillor taking part in consideration of an issue in the light of those interests. The definitions of disclosable pecuniary interests can be found at Appendix 18, Annex 3 of the Constitution. A failure to register a disclosable pecuniary interest within 28 days of election or co-option or the provision of false or misleading information on registration, or participation in discussion or voting in a meeting on a matter in which a councillor or co-opted member has a disclosable pecuniary interest, are criminal offences

6.2 For full guidance on interests, see ‘Openness and Transparency on Personal Interests: Guidance for Councillors’, Department for Communities and Local Government, March 2013. (This Protocol does not seek to replicate the detailed information contained within the DCLG note). Advice should always be sought from the Council’s Monitoring Officer prior to the meeting. Ultimately, responsibility for fulfilling the requirements rests with each Member

6.3 The provisions of the Act seek to separate interests arising from the personal and private interests of the councillor from those arising from the councillor’s wider public life. Councillors should think about how a reasonable member of the public, with full knowledge of all the relevant facts, would view the matter when considering whether the councillor’s involvement would be appropriate

6.4 The Council’s Members’ Code of Conduct establishes what interests need to be disclosed. All disclosable interests should be registered and a register maintained by the Council’s Monitoring Officer and made available to the public. Members should also disclose that interest orally at the committee meeting or meeting of Council when it relates to an item under discussion

6.5 A Member must provide the Monitoring Officer with written details of relevant interests within 28 days of their election or appointment to office. Any changes to those interests must similarly be notified within 28 days of the councillor becoming aware of such changes

6.6 A disclosable pecuniary interest relating to an item under discussion requires the withdrawal of the Member from the Committee or meeting of Council. In certain circumstances, a dispensation can be sought from the appropriate body or officer to take part in that particular item of business

6.7 If a Member is present at the Planning Committee specifically for the purposes set out in the Council’s procedure for making direct representations to the Planning Committee, they may remain in the meeting after they have made their presentation but they should take no further part in the determination of that item

- 6.8 If a Member has a (non-pecuniary) personal interest, he or she should disclose that interest, but then may speak and vote on that particular item. This includes being a member of an outside body; mere membership of another body does not constitute an interest requiring such a prohibition
- 6.9 It is always best to identify a potential interest early on. If a Member thinks that they may have an interest in a particular matter to be discussed at the Planning Committee or at Full Council he or she should raise this with the Council's Monitoring Officer prior to the meeting
- 6.10 The Planning Committee operates a guillotine on late representations and submissions<sup>7</sup>. Members should determine applications before them upon the basis of the information contained in and referred to within the officer report. In the event of Members of the Planning Committee and their substitutes receiving representations direct from applicants, their agents and third parties, particularly after the guillotine on late representations, they should bring such material to the attention of officers, and consider carefully any advice given to them by officers with respect to the consideration of such representations.

## **7. Applications by Members**

- 7.1 All applications for planning permission by Members or those related<sup>8</sup> to them must be dealt with by the Planning Committee and not under delegated powers. The standard national planning application form requires the applicant to indicate whether they are a member of staff, an elected Member, related to a member of staff or related to an elected Member
- 7.2 Members making such an application or with knowledge of such an application being made, should inform the Council's Head of Planning of this within 14 days of the submission of such an application
- 7.3 In the event of the Head of Planning becoming aware that an application is being made by a Member or a person related to a Member, they will inform the Council's Monitoring Officer
- 7.4 Members would undoubtedly have a disclosable pecuniary interest in their own application, and potentially their relatives' application, and should not participate in its consideration. If a Member is present at the Planning Committee specifically for the purposes set out in the Council's procedure for making direct representations to the Planning Committee, they may remain in the meeting after they have made their presentation but they should take no further part in the determination of that item.

## **8. Members as Agents for Others**

<sup>7</sup> As resolved Planning Committee June 2008, and amended February 2009

<sup>8</sup> 'Related' means related by birth or otherwise, closely enough that a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility of bias on the part of the decision maker in the local planning authority

- 8.1 Members who act as a paid agent for people making a planning application or objecting to such an application, or for people in respect of whose development enforcement or similar action is proposed, should play no part in the decision making process for that matter. They must inform the Head of Planning beforehand of their involvement, and the person on whose behalf they are acting. Any such matter will be considered by the Planning Committee (and not dealt with under delegated powers) and the agency of the Member will be reported to the Committee
- 8.2 Where a person related to a Member acts as a paid agent for people making a planning application or objecting to such an application, or for people in respect of whose development enforcement or similar action is proposed, that Member, once they are aware of this, should play no part in the decision making process for that matter. They must inform the Head of Planning beforehand of their relatives' involvement, and the person on whose behalf their relatives are acting. Any such matter will be considered by the Planning Committee (and not dealt with under delegated powers) and the agency of the Member's relative will be reported to the Committee.

**9. Decisions Contrary to Head of Planning's Recommendation to the Planning Committee**

- 9.1 Members of the Committee and their substitutes should draw to case officer's attention any concerns that they have with an application coming to the Committee for determination, as soon as possible having received notice of the application in the 'weekly list of applications received', so that potential solutions are sought with the applicant in accordance with the requirements of the National Planning Policy Framework<sup>9</sup>.
- 9.2 Full advantage should be taken of the use of conditions in planning permissions to make developments acceptable<sup>10</sup>
- 9.3 Members of the Committee and their substitutes who are disposed to move refusal of a proposal contrary to recommendation are urged to contact the Head of Planning (or his representative) no less than 24 hours before the Committee meeting, with details of the reasons they are minded to give for such a refusal
- 9.4 When a proposal to refuse to grant planning permission is made at the Committee contrary to the officer's recommendation, advice should be sought by the Committee as to the most appropriate way to meet the requirement to work in a proactive and positive manner with applicants. That may in certain circumstances such as where technical advice is

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<sup>9</sup> As resolved Planning Committee May 2015

<sup>10</sup> As resolved Planning Committee May 2015

not being accepted include a deferral of the decision in order to enable further technical advice to be obtained and reported to the Committee<sup>11</sup>

- 9.5 The mover and seconder of a resolution of refusal contrary to officer recommendation should be identified by the Chair and recorded in the minutes of the Committee, and in the event of an appeal being lodged there is an expectation that those Members will make themselves available as witnesses on behalf of the Council in the appeal proceedings should either the Head of Planning or the Head of Business Improvement, Central Services and Partnerships or their representatives deem that appropriate<sup>12</sup>
- 9.6 The law requires that decisions should be taken in accordance with the development plan, unless material considerations indicate otherwise (s38A Planning and Compensation Act 2004 and s70 of the Town and Country Planning Act 1990)<sup>13</sup>
- 9.7 Where the Committee propose to make a decision which is contrary to the recommendation of the Head of Planning the Chair will allow the presenting officer to explain the implications of a contrary decision.

## **10. Predisposition, predetermination, or bias**

- 10.1 Members of the Planning committee and their substitutes, (and of Full Council when the Local Plan is being considered), need to avoid any appearance of bias or of having predetermined their views before taking a decision on a planning application or on planning policies.
- 10.2 The Courts have sought to distinguish between situations which involve predetermination or bias on the one hand and predisposition on the other. The former is indicative of a 'closed mind' approach and likely to leave the committee's decision susceptible to challenge by Judicial Review
- 10.3 Clearly expressing an intention to vote in a particular way before a meeting (predetermination) is different from where a councillor makes it clear they are willing to listen to all the considerations presented at the committee before deciding on how to vote (predisposition). The latter is acceptable; the former is not and may result in a Court quashing such planning decisions
- 10.4 Section 25 of the Localism Act also provides that a councillor should not be regarded as having a closed mind simply because they previously did or said something that, directly or indirectly, indicated what view they might take in relation to any particular matter
- 10.5 This reflects the common law position that a councillor may be predisposed on a matter before it comes to Committee, provided they remain open to listening

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<sup>11</sup> As resolved Planning Committee May 2015

<sup>12</sup> As resolved Planning Committee May 2015

<sup>13</sup> In dealing with an application for planning permission the Local Planning Authority shall have regard to (a) the provisions of the development plan, so far as material to the application, (b) any local finance considerations, so far as material to the application, and (c) any other material consideration

to all the arguments and changing their mind in light of all the information presented at the meeting. Nevertheless, a councillor in this position will always be judged against an objective test of whether the reasonable onlooker, with knowledge of the relevant facts, would consider that the councillor was biased

- 10.6 If a councillor has predetermined their position, they should withdraw from being a member of the decision-making body for that matter. This would apply to any member of the Planning Committee who wanted to speak for or against a proposal, as a campaigner (for example on a proposal within their ward). If the Council rules allow substitutes to the meeting, this could be an appropriate option
- 10.6 Authorities will usually have a Cabinet/Executive Member responsible for development and planning. This councillor is able to be a member of the Planning Committee. Leading members of a local authority, who have participated in the development of planning policies and proposals, need not and should not, on that ground and in the interests of the good conduct of business, normally exclude themselves from decision making committees.

## **11. Lobbying**

- 11.1 Lobbying is a normal part of the planning process. Those who may be affected by a planning decision, whether through an application, a site allocation in a development plan or an emerging policy, will often seek to influence it through an approach to their Ward Member or to a member of the Planning Committee
- 11.2 As the Nolan Committee's 1997 report stated: "It is essential for the proper operation of the planning system that local concerns are adequately ventilated. The most effective and suitable way that this can be done is through the local elected representatives, the councillors themselves"
- 11.3 Lobbying, however, can lead to the impartiality and integrity of a Member being called into question, unless care and common sense is exercised by all the parties involved
- 11.4 As noted earlier in this Protocol, the common law permits predisposition but nevertheless it remains good practice that, when being lobbied, Members (and those on the Planning Committee and their substitutes in particular) should try to take care about expressing an opinion that may be taken as indicating that they have already made up their mind on the issue before they have been exposed to all the evidence and arguments
- 11.5 In such situations, they could restrict themselves to giving advice about the process and what can and cannot be taken into account. Members can raise issues which have been raised by their constituents, with officers. If Members do express an opinion to objectors or supporters, it is good practice that they make it clear that they will only be in a position to take a final decision after having heard all the relevant arguments and taken into account all relevant material and planning considerations at Committee

- 11.6 It is very difficult to find a form of words which conveys every nuance of these situations and which gets the balance right between the duty to be an active local representative and the requirement when taking decisions on planning matters to take account of all arguments in an open-minded way. It cannot be stressed too strongly, however, that the striking of this balance is, ultimately, the responsibility of the individual councillor
- 11.7 Planning decisions cannot be made on a party political basis in response to lobbying. The use of political whips to influence the outcome of a planning application is likely to be regarded as maladministration
- 11.8 Planning Committee members and their substitutes should in general avoid organising support for or against a planning application, and avoid lobbying other councillors
- 11.9 Councillors should not put pressure on officers for a particular recommendation and should not do anything which compromises, or is likely to compromise, the officers' impartiality or professional integrity
- 11.10 Members may be tempted to form a judgement about an application early on in its passage through the planning system, whether or not they have been lobbied. The nature of the proceedings of the Planning Committee is such however that it is important that those arriving at the decision should not be vulnerable to an accusation of partiality because they have committed themselves one way or the other or have declared publicly the way in which they intend to vote on the application
- 11.11 When being lobbied about particular applications or proposals, Members of the Planning Committee or their substitutes must, therefore, avoid expressing an opinion either to applicants or objectors or supporters which may be taken as indicating that they have already made up their mind on the issue before they have considered all the information, evidence and arguments, or which appears to commit the authority on a particular application. In such situations, it is safer if they restrict themselves to giving procedural advice, including suggesting to those who are lobbying that they should speak or write to the Head of Planning in order that their opinions can be included in the Head of Planning's report to the Committee
- 11.12 Members of the Planning Committee or their substitutes need to take account of the general expectation that a planning application will be processed and determined in a transparently open and fair manner and that the Committee's decision will be taken on the merits of the application having regard to the provisions of the Development Plan and all other material considerations, including local finance considerations. It would therefore be inconsistent with open and fair treatment for a Member of the Planning Committee or their substitutes to organise support for or opposition to a particular proposal, or to lobby other Members

- 11.13 It is important also to recognise that a member of the Planning Committee who is a Member for the Ward affected by a particular planning application may be in a difficult position if it is a controversial application around which a lot of lobbying takes place. If the Member responds to lobbying by deciding to go public in support of a particular outcome – or even to campaign actively for it – it would be very difficult for that Member to argue convincingly when the Committee comes to take its decision that he/she has carefully weighed all the information, evidence and arguments presented
- 11.14 Similar issues can arise if the Committee member is also a Member of the Parish Council to whose area the application relates
- 11.15 Whilst there is a view that the proper course of action for such a Member would be to make an open declaration and not to vote, this would be a severe restriction on the Member's ability to represent the views of the electorate
- 11.16 Accordingly, if a member of the Committee or a substitute wishes to express a preliminary opinion or to give preliminary support to a particular body of opinion, that Member should make it clear that he or she will only be in a position to take a final decision after having heard and/or seen all the relevant information, evidence and argument put before the Planning Committee
- 11.17 However, any member of the Committee or a substitute who expresses publicly a final view on a planning application prior to the Committee meeting at which a decision is to be taken, or who organises support for, or opposition to, a particular proposal, or lobbies other Members should declare an interest and not vote on that matter, though having declared that interest he or she may speak on it as a Member of the Committee
- 11.18 The Local Government Association suggests that in most cases, short of high profile active lobbying for a particular outcome, it should be possible for a Member to give support to a particular body of opinion whilst waiting until the Committee meeting and hearing and/or reading all the information, evidence and arguments presented before making a final decision. The striking of the balance in such cases is ultimately the responsibility of the individual member and in doing so, regard needs to be paid to the general rules laid down in the Members' Code of Conduct in Appendix 18 and the responsibility of the Councillor alone to decide what view to take on any question, on its merits and not to do anything which could not be justified to the public
- 11.19 Since a planning application which is to come before the Planning Committee for a decision cannot be decided upon before the meeting of the Committee, when all relevant available information is to hand and has been considered, a political group meeting should not be used to

decide how Members should vote. Planning Committee members are not subject to a party whip

- 11.20 Members are entitled to make representations with respect to planning applications but should not put pressure on any officer for a particular recommendation, or to exercise a delegated power in a particular way. (See also Appendix 20 of the Constitution – Elected Member/Officer Relations Protocol).

19th November 2015