

Part 5(b) – Probity in Planning – Guidance to Councillors and Officers

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Part 5(b) – Probity in Planning – Guidance to Members and Officers

Background

This guidance is based on the revised edition of the Local Government Association publication “Probity in Planning 2009” which refreshes the guidance contained in its previous 2002 publication.

This guidance also takes into account the National Guide for Councillors 2007, The Planning Officer Practice Guide 3 2007, Positive Engagement – Guide for Planning Councillors 2008, and the Killain Pretty review recommendations 2008.

The aim of this guidance is to ensure that planning decisions are made in an open, transparent and impartial manner, and also to facilitate the development of Councillors’ community roles in respect of planning matters.

For ease of reading Development Control Committee has been abbreviated to DCC.

1. The General Role and Conduct of Councillors and Officers

- 1.1 Councillors and officers have different, but complementary, roles. Both serve the public but Councillors are responsible to the electorate, while officers are responsible to the Council as a whole. Officers advise Councillors and the Council, and carry out the Council’s work. They are employed by the Council, not by individual Councillors and it follows that instructions may only be given to officers through a Council, Cabinet or committee decision. A successful relationship between Councillors and officers can only be based upon mutual trust and understanding of each others positions. This relationship, and the trust which underpins it, must never be abused or compromised. It also relies on each ensuring that they act in a way which is not only fair and impartial, but is also clearly seen to be so.
- 1.2 Both Councillors and officers are guided by codes of conduct.

Councillors

- 1.3 The Members’ Code of Conduct (**Part 5(a)**) sets out the requirements on Councillors in relation to their conduct. Breaches of the Members’ Code of Conduct may be referred to the Monitoring Officer for investigation and will be usually regarded as maladministration by the Local Government and Social Care Ombudsman.
- 1.4 The Members’ Code of Conduct covers issues central to the preservation of an ethical approach to Council business (including the need to register and declare interests); appropriate relationships with other Councillors, staff and the public, which will impact on the way in which Councillors participate in the planning process.
- 1.5 A Councillor serving on the Development Control Committee (“DCC”) or who otherwise becomes involved in making a planning decision (i.e. where exceptionally full Council deals with a planning application) “... must not use or attempt to use his position improperly to confer on or secure for himself or any other person, an advantage or disadvantage...” (paragraph 5(a) of the Members’ Code of Conduct).
- 1.6 The basis of the planning system is the consideration of private proposals against wider public interests. Much is often at stake in this process and opposing views are often strongly held by those involved. Whilst Councillors should take account of those views, they should not favour any person, company, group or locality, nor put themselves in a position where they appear to do so. Councillors who do not feel that they can act in this way should consider whether they are best suited to serving on the DCC.

- 1.7 Councillors should also be extremely cautious about accepting gifts and hospitality. In any event the receipt of any gift or hospitality over the value of £50 must be registered in accordance with the Members' Code of Conduct (see paragraph 13(1)).

Officers

- 1.8 All officers are subject to an Employee Code of Conduct established by the Council, (see **Part 5(c)** of the Constitution) requiring conduct of the highest order. In particular this requires that officers treat all members of the community and customers with fairness and equity. Again there are strict rules relating to hospitality. Officers should not accept personal gifts except items of token value.
- 1.9 In addition the Local Government and Housing Act 1989 provides that certain posts are "politically restricted" and those who hold such posts are prevented from carrying out certain outside activities.
- 1.10 Finally planning officers who are members of the Royal Town Planning Institute ("RTPI") are subject to a professional Code of Conduct and breaches may be subject to disciplinary action by the RTPI.

2. Declaration and Registration of Interests, Bias and Predetermination

Interests

- 2.1 The Localism Act 2011 and the Members' Code of Conduct place requirements on Councillors regarding the registration and declaration of their interests, and the consequences of having such interests.
- 2.2 Interests are described as being either a Disclosable Pecuniary Interest (DPI), Other Pecuniary Interest or Non-Pecuniary Interest. These terms are explained in full in **Part 5(a)** of the Constitution.
- 2.3 If a Councillor has a DPI, Other Pecuniary Interest or disqualifying Non-Pecuniary Interest (pursuant to the test in paragraph 10.3 of the Members' Code of Conduct) then they must withdraw while the matter is considered. If a Councillor only has a Non-Pecuniary Interest then after declaring this they can participate in the debate and vote. Again, this is fully explained in **Part 5(a)** of the Constitution.
- 2.4 Requirements relating to declaration of interests must be followed scrupulously.
- 2.5 Councillors who are unsure whether an interest should be declared should seek the advice of the Monitoring Officer or the solicitor to the DCC, preferably in advance of the committee meeting, although the ultimate responsibility for fulfilling the requirements rests individually with each Councillor.
- 2.6 A Register of Members' interests is maintained by the Monitoring Officer. Councillors should review their situation regularly, and ensure the register is kept up to date. The Register is open to the public.

Bias and Predetermination

- 2.7 It is essential that DCC members attend DCC with an open mind, prepared to consider all evidence and argument from both sides before making a decision. A DCC member who has, or is seen to have a biased view or a pre-determined position cannot vote or participate in the relevant matter.

A useful test to determine whether a position or view could be considered to be biased is to think about whether a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility of bias.

- 2.8** A perception of bias, even if no actual bias is established, can be sufficient to render a planning decision vulnerable to either a high court challenge, a complaint to the Local Government and Social Care Ombudsman, or to an award of costs in a planning appeal, depending on the nature of the decision.
- 2.9** Members of DCC need to be particularly vigilant when speaking to the press about a planning application not to make comments indicating pre-determination.

3. Development Proposals Submitted by Councillors and Officers, and Council Development

- 3.1** Proposals to their own authority by Councillors and Officers and their close friends and relatives can easily give rise to suspicions of impropriety. So indeed can proposals for a Council's own development. Proposals can take the form of either planning applications or Development Plan proposals.
- 3.2** It is perfectly legitimate for such proposals to be submitted, and such proposals should be treated with the same transparency and impartiality as those of private developers.
- 3.3** It is vital to ensure that they are handled in a way which gives no grounds for accusations of favouritism. Accordingly:
- (a)** Any Councillors or Officers who act as agents in respect of a planning matter with the Council should play no part in the decision-making process for that proposal. Similarly, if they submit their own proposal to the Council, they should take no part in its processing or decision making. Any such proposals will be considered and determined by DCC.
 - (b)** Proposals for the Council's own development must be treated in accordance with Government advice.

4. Lobbying of and by Councillors

- 4.1** It is important to recognise that lobbying is a normal and perfectly proper part of the political process. Those who may be affected by a planning decision will often seek to influence it through an approach to their elected Ward Councillors or to a member of the DCC.
- 4.2** However, such lobbying can, unless care and common sense are exercised by all the parties concerned, lead to the impartiality and integrity of a Councillor being called into question, particularly when members of DCC who are taking a planning decision have been lobbied on that very matter.
- 4.3** In considering planning applications and other planning matters Councillors must take account of all relevant planning considerations, including those presented at committee, before arriving at a decision. In this way, the decision is, and is seen to be determined in a transparent, and fair and reasonable manner.
- 4.4** To have previously committed themselves one way or the other before hearing all the arguments and evidence makes them vulnerable to an accusation of partiality. It could result in an aggrieved party seeking a Judicial Review of the way in which a decision has been arrived at, or a complaint to the Local Government & Social Care Ombudsman on grounds of maladministration, or an award of costs at an appeal, depending on the nature of the decision.
- 4.5** Therefore, when being lobbied, Councillors, particularly those of the DCC should take care about expressing an opinion which 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. In such situations, Councillors should restrict themselves to giving procedural advice, which may include suggesting that those who are lobbying should speak or write to the relevant planning officer in order that their opinions can be included in the officer report to committee.

- 4.6** If members of DCC do express an opinion, they should make it clear that they will only be in a position to take a final decision after having heard all the relevant evidence and arguments at DCC. In that way they will not have predetermined a matter.
- 4.7** Members of the DCC should not have decided, and so should not openly declare which way they intend to vote in advance of having heard all of the evidence and arguments from all sides at the DCC meeting.
- 4.8** In reality, of course, Councillors will often form an initial view about an application early on in its passage through the system, whether or not they have been lobbied. That is understandable and perfectly reasonable as long as they are prepared to listen to, and consider all the relevant evidence and arguments from both sides.

Ward Councillors

- 4.9** Political reality suggests that it is often important to distinguish between the role of the DCC member who is, and who is not, a Ward Councillor for the area affected by a particular planning application.
- 4.10** A DCC member who does not represent the ward affected is in an easier position to adopt an impartial stance, however strong their feelings about the application may be, and to wait until the DCC meeting before declaring one way or the other.
- 4.11** A DCC member who represents a ward affected by an application is in a difficult position if it is a controversial application around which a lot of lobbying takes place. If the DCC member responds to lobbying by deciding to go public in support of a particular outcome or in opposing it, they will not be able to demonstrate that they are prepared to consider all relevant evidence and argument, as they will have clearly predetermined their position. In such circumstances, the Councillor must declare at the DCC meeting their predetermined position and leave the meeting.
- 4.12** The Ward Councillor effectively has to choose between supporting a cause and so having a predetermined position, and taking an active role in the decision making process at DCC. It cannot be stressed too strongly that the striking of this balance is, ultimately, the responsibility of the individual Councillor.

Specific Issues

- 4.13** Given that the point at which a decision on a planning application is made cannot occur before the meeting, when all available information is to hand and has been duly considered, any political group meeting prior to the DCC meeting must not be used to decide how Councillor should vote.
- 4.14** Councillors in general should avoid organising support for or opposition to a planning application, and avoid lobbying other Councillors. Such actions can easily be misunderstood by parties to the application and by the general public.
- 4.15** Councillors should not put pressure on officers for a particular recommendation and should not do anything which compromises, or is likely to compromise, their impartiality.
- 4.16** Where a Councillor receives written representations directly in relation to a planning application they shall pass the correspondence to the planning case officer in order that those representations may be taken into account and set out in any committee report.
- 4.17** A request to refer to DCC an application that is delegated to officers under paragraph **5.7.4** of **Part 3 Schedule 3**, might include a general reason (although there is no requirement to do so). However a Councillor (particularly a DCC member) should not express a view as to whether they believe the application is acceptable or not, as this could amount to predetermination.

5. Pre-Application Discussions on Major Applications

- 5.1** Discussions between a potential applicant and the Council prior to the submission of an Application can be of considerable benefit to both parties and is encouraged by the Local Government Association, and the Planning Advisory Service.
- 5.2** However, it would be easy for such discussions to become, or be seen by objectors to become, part of a lobbying process.
- 5.3** In order to avoid such problems, all pre-application discussions should take place within clear guidelines. Although the term 'pre-application' has been used, the same considerations should apply to any discussions which take place before a decision is taken.
- 5.4** A distinction is made between pre-application discussions for minor development, and those for major development.

Minor Applications

- 5.5** Pre-application discussions in respect of minor applications should be dealt with by officers. The following general guidelines in 5.6 - 5.9 must be adhered to:
- 5.6** It should always be made clear at the outset that the discussions will not bind the Council to making a particular decision and that any views expressed are personal and provisional. By the very nature of such meetings not all relevant information will be to hand, neither will formal consultations with interested parties have taken place.
- 5.7** Advice should be consistent and based upon the Development Plan and material considerations. All officers taking part in such discussions should make clear whether or not they are the decision-maker.
- 5.8** A note should be made of all meetings. A follow-up letter is advisable where there is any risk of ambiguity in respect of the outcome of any meeting. A note should also be taken of telephone discussions.
- 5.9** Care must be taken to ensure that advice is not partial, nor is it seen to be so.

Major Applications

- 5.10** It is recognised that Councillor engagement in pre-application discussions for major development is important, and should be encouraged.
- 5.11** However, the involvement of Councillors can, if the process is not carefully controlled, give rise to allegations of partiality and that Councillors have fettered their discretion. Accordingly, discussions involving Councillor participation should take place within the general guidelines in 5.6 - 5.9 and the following additional guidelines in 5.12 - 5.14:
- 5.12** All meetings will be arranged by officers, and must be attended by at least one officer, who will make a record of the discussions that took place. That record will be available for public inspection.
- 5.13** A Councillor may not participate in pre-application discussions if they have a prejudicial interest in the matter.
- 5.14** Councillors must ensure that they are familiar with the need to remain impartial, and unbiased.

Pre-Application Presentations to Councillors on major Applications

- 5.15** A developer presentation to Councillors and stakeholders can be useful in connection with a major application. It should be part of the wider Statement of Community Involvement process involving other consultation as set out in the SCI and in this note.
- 5.16** It is an opportunity for the developer to explain his proposals and to be asked questions by Councillors and stakeholders.
- 5.17** It is important that presentations take place at an early pre-application stage in the development process so that developers may address certain aspects of their proposals as a result of questions asked during the presentation.
- 5.18** Presentations by developers will not be appropriate after a planning application is submitted to the Council. This is because at that stage there may be third party interest (e.g. objecting to the proposal) and third parties will not have the same opportunity to be able to present their ideas to Councillors.
- 5.19** The presentation will be arranged by the Director of Planning and Transportation. Presentations will normally take place in the Civic Centre. The developer should be made aware that it can take a while (e.g. possibly up to twelve weeks) to find a time for the presentation. The invitees should include:
- All members of the Council (Ward Councillors to receive a letter or email, other Councillors to be advised by Councillor update)
 - The Planning Case Officer and any other Officers who will have a significant role in the case.
 - An officer from Highways Team
 - A spokesperson for any local residents group and their deputy.
 - A spokesperson for any identified group where the activities of the group are related to the proposal.
- 5.20** The presentation is introduced by a Chair or Vice Chair of DCC, and will normally comprise:
- (a)** Chair's introduction, including advising the meeting of the rules to ensure that no issues of pre-determination can arise (2 minutes)
 - (b)** Planning officer to provide a planning policy context for the development (5 minutes)
 - (c)** The developer to outline their proposals (roughly 10 to 15 minutes)
 - (d)** Questions and answers (roughly 30 minutes)
 - (e)** A debrief of Councillors only following meeting.
 - (f)** Officers will then draft a letter to the developers within 14 days of the date of the meeting outlining the main issues relating to the proposal (Councillors who attended meeting will also be provided with a copy).

- 5.21** When introducing a Developer Presentation to Councillors and stakeholders the following information should be presented:
- This is a Developer Presentation to Councillors and stakeholders and is being conducted under our guidance for such meetings.
 - The following stakeholders have been invited [names]
 - DCC members should remain open minded about development proposals and should not reach a firm view of the merits or otherwise of a proposal as a result of this presentation.
 - There will be a question and answer session at the end of the meeting.
 - No Councillors should make statements in support of or opposed to the development proposals but should restrict themselves to questions. Councillors should also be aware that in raising questions, there is no impression given of support or opposition to any application. Stakeholders are requested to do the same.
- 5.22** Formal minutes will not be taken of the Developer Presentation. Developers are required to submit a Statement of Community Involvement with their planning application. Developers should note in this that a developer presentation took place.
- 5.23** Developers should not by themselves arrange a Developer Presentation for Councillors and stakeholders. This can only be done by officers. If developers do want to arrange a meeting where they can present their ideas to Councillors and stakeholders, this should, in accordance with the SCI take the form of a public meeting. The key differences are:
- (a) The public meeting should be held local to the development site;
 - (b) The general public should be invited; and
 - (c) DCC members should not be specifically targeted as the invitees (rather it would be the local Ward Councillors who would be invited or all Councillors).
- 5.24** A behind closed doors meeting between a developer and members of the DCC would not be acceptable.

6. Officer Reports to Committee

- 6.1** The courts and advice from the Local Government & Social Care Ombudsman have determined that officer reports on planning applications must have regard to the points in 6.2 - 6.6 below:
- 6.2** Reports should be accurate and cover, among other things, the substance of objections and the views of people who have been consulted
- 6.3** Relevant points will include a clear exposition of the Development Plan, site or related history, and any other material considerations.
- 6.4** Oral reporting, except to update a report, should be extremely rare and carefully minuted when it does occur.
- 6.5** Reports should have a written recommendation of action.
- 6.6** Reports should contain a technical appraisal which clearly justifies the recommendation. If the recommendation in the report is contrary to the provisions of the Development Plan (a departure), the material considerations which justify this must be clearly stated.

- 6.7** It is particularly important to follow this guidance, not only as a matter of good practice, but because failure may constitute maladministration and / or give rise to judicial review on the grounds that the decision was not taken in accordance with the provisions of the Development Plan and the Council's statutory duty under Section 38(6) of the Planning and Compulsory Purchase Act 2004.
- 6.8** Any Council officer speaking to the press about a planning application on a DCC agenda should not strengthen the recommendation (whether for approval or refusal) and should emphasise that it is the Committee that makes the decision.

7. Public Speaking at Development Control Committee

- 7.1** The Council operates a system of public participation in respect of planning applications that are considered by DCC (see Standing Order 6C in **Part 4(a)**), and details of this scheme are set out below:
- 7.2** If an objector wishes to address DCC in respect of an application, they must give written notice of that request by 12 noon on the last working day before the relevant meeting.
- 7.3** Once an objector has given such notice, the applicant will be notified of the fact and the date and time of the relevant meeting and be afforded the opportunity to address that meeting in response.
- 7.4** An applicant or supporter will only be allowed to address the relevant meeting if an objector has exercised their right to speak.
- 7.5** Only one speaker in support of, and one speaker against, the planning application will be permitted to address DCC. Local groups / organisations (or their representatives) will not be afforded the opportunity to address the DCC in respect of a planning application.
- 7.6** Where more than one person wants to speak for or against a planning application, then a spokesperson must be appointed. Where a spokesperson cannot be agreed, then the Chair will decide who shall speak. Where more than one person wants to respond in support of a planning application then the applicant has priority. Should a Councillor speak against an application, the applicant does not have the same right to reply as referred to in 7.4.
- 7.7** An objector or applicant / supporter may be represented by an agent.
- 7.8** All speakers will be limited to three minutes each.
- 7.9** Speakers will not be allowed to ask a supplementary question or make a supplementary statement and will not be cross-examined.

8. Late Representations

- 8.1** How the receipt of late representations are dealt with will vary depending on circumstances:

Late Representation Received by Officers Prior to Committee

- 8.2** Regulations provide a statutory framework for the receipt of representations, including the 21 day period. On the other hand, if the Council does not take account of a material planning consideration, whether or not received within the statutory period, its decision could be challenged. It is an extremely difficult situation that should be carefully controlled.
- 8.3** Most late representations do not raise new material planning considerations. Late representations will be dealt with in different ways depending on how late they are, as set out in 8.4 - 8.5 below:
- 8.4** If late representations are received by officers more than 3 working days before the DCC meeting, officers will have an opportunity to consider them. Unless the representations introduce a new material planning consideration that needs to be explored more fully, officers will prepare a supplementary report to DCC enclosing a summary of them.

- 8.5** If representations are received 3 working days or less before the DCC meeting, officers may not have had the opportunity to consider them fully, nor to advise on whether or not they are factually correct.

If the late representation introduces no new material considerations, it will not be put before DCC and will not be considered.

If the late representation does introduce a new material consideration, officers will so advise the DCC, so that the new consideration can be taken into account. If absolutely necessary, for example the new consideration raises issues that need to be further explored; the item would need to be deferred.

Photos and Other Information Presented at Committee

- 8.6** Such information will not have been considered at all by officers. It may be misleading or factually incorrect. For example, a photo taken at a particular angle that supports the position of the person presenting it. To permit such material to be considered could be dangerous. Subject to exceptional circumstances producing such documents at DCC should not be permitted.

9. Decisions Contrary to the Development Plan and / or Officer Recommendation

- 9.1** The law requires that decisions should be taken in accordance with the Development Plan unless material considerations indicate otherwise (Section 38(6) Planning & Compulsory Purchase Act 2004). This gives rise to two main issues:

Firstly, all applications that are not in accordance with the Development Plan must be identified and advertised as such.

Secondly, if it is intended to approve such an application the material considerations justifying such decision must be clearly identified and how those considerations override the Development Plan must be clearly demonstrated. The application may then have to be referred to the Secretary of State depending upon the type and scale of development proposed. If the officer's report recommends approval of such departure from plan policy, the justification for this should be included in full in that report.

- 9.2** Prior to a decision being made, which is contrary to the recommendation in the report, the officer should be given the opportunity to explain the implications of making such a decision.
- 9.3** If the DCC makes a decision which is contrary to the recommendation in the officer report, the minute should record the DCC's reasons for refusal or approval, as the case may be. The Courts have expressed the view that such reasons should be clear and convincing. Personal circumstances of the applicant will rarely provide such grounds. A copy of the DCC minute will be placed on the planning file.
- 9.4** A senior legal officer should always attend DCC to ensure that procedures have been properly followed.

10. Pre-Meeting Site Visits

10.1 Site visits by Councillors before DCC cause delay and cost, and should only be carried out where necessary.

Necessity

10.2 A site visit is only likely to be necessary if either:

- the proposed development is difficult to visualise from the plans, photographs and supporting material; or
- There is good reason why the comments of the applicant and / or objector(s) cannot be expressed adequately in writing; or
- the proposal is particularly contentious; or
- a particular Councillor requests it and the request is agreed by the Chair of DCC.

Requesting a Site Visit

10.3 The DCC agenda will list which applications will be preceded by a site visit.

10.4 Councillors can request a site visit by contacting the Director of Planning and Transportation or the Group Manager; providing the reason for the request. The officers will consult with the Chair.

10.5 If the agenda has not yet been printed, notification of the site visit will be included on the agenda.

10.6 If the agenda has already been printed, officers will notify Councillors separately of the additional site visit.

10.7 If the request for a site visit is made at the DCC meeting, Councillors will discuss and resolve whether to defer consideration of the item until a site visit has been carried out.

Protocol

10.8 Where a site visit does take place, the Protocol is as follows:

- It will take normally place during the morning of DCC.
- An officer will always arrange the site visit.
- A planning officer will always attend and conduct the site visit, and will bring relevant issues to the attention of Councillors. The officer will keep a record of the attendance, and a brief note of events of the visit.
- The visit need only be made known to the applicant or objector where it is necessary to enter the land of either.
- Representations will not be heard, and material will not be accepted. No debate with any party will take place.
- The Chair may invite an applicant or objector to point out matters or features relevant to the matter, having first explained to them that it is not the function of the visit to accept representations or to debate.

11. Regular Review of Decisions

- 11.1** Members of the DCC should review a sample of implemented planning permissions to assess the quality of the decisions. Such a review should improve the quality and consistency of decision-making, strengthening public confidence in the planning system, and can help with reviews of planning policy. It should also assist DCC members to refine their understanding of the impact of their decisions.
- 11.2** A review will usually be undertaken annually, and will be arranged by officers, in consultation with the Chair of DCC.
- 11.3** It should include examples from a broad range of categories, such as, major and minor development, permitted departures, upheld appeals, listed building works and enforcement cases. Briefing notes should be prepared on each case. The DCC should formally consider the review and decide whether it gives rise to the need to review any policies or practices.

12. Complaints and Record Keeping

- 12.1** Whatever procedures a Council operates, it is likely that complaints will be made. However, the adoption of this Guidance should reduce the occasions on which complaints are justified. It should also provide less reason for people to complain in the first place.
- 12.2** The Council already has a fully developed local complaints system.
- 12.3** So that complaints may be fully investigated, and in any case as a matter of general good practice, record keeping should be complete and accurate. Omissions and inaccuracies could, in themselves, cause a complaint or undermine the Council's case. Every planning application file should contain an accurate account of events throughout its life. It should be possible for someone not involved with that application to understand what the decision was and how and why it had been reached. Particular care needs to be taken with applications determined under officers' delegated powers. Such decisions should be as well documented and recorded as those taken by the DCC. These principles apply equally to enforcement and development plan matters.

13. Date of Introduction

This Code was adopted by the Council on 4th November 2010.