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## PROBITY IN PLANNING

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### 1.0 INTRODUCTION

- 1.1 Planning has a positive and proactive role to play at the heart of Local Government. It helps the Councils to stimulate growth whilst looking after important environmental areas. It can help to translate goals into action. It balances social, economic and environmental needs to achieve sustainable development.
- 1.2 The planning system works best when Officers and Members involved in planning understand their roles and responsibilities, and the context and constraints in which they operate.
- 1.3 Planning decisions involve balancing many competing interests. In doing this, decision-makers need an ethos of decision-making in the wider public interest on what can be controversial proposals.
- 1.4 It is recommended that Members should receive regular training on Code of Conduct issues, interests and predetermination, as well as on planning matters.

### 2.0 BACKGROUND

- 2.1 Early Member engagement is encouraged to ensure that proposals for sustainable development can be harnessed to produce the settlements that communities need. This Protocol is intended to reinforce Members' community engagement roles, whilst maintaining good standards of probity that minimise the risk of legal challenge.
- 2.2 Planning decisions are based on balancing competing interests and making an informed judgement against a local and national policy framework. Decisions can be controversial. The risk of controversy and conflict are heightened by the openness of a system which invites public opinion before taking decisions and the legal nature of the development plan and decision notices. Nevertheless, it is important that the decision-making process is open and transparent.
- 2.3 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. Opposing views are often strongly held by those involved.

- 2.4 Whilst Members must take account of these views, 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.
- 2.5 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.
- 2.6 This guidance is not intended to be prescriptive. Local circumstances may provide reasons for local variations of policy and practice. Every Council should regularly review the way in which it conducts its planning business.
- 2.7 This Protocol, which is based on the Local Government Association Probity in Planning Guidance, refers mainly to the actions of a Local Authority Planning Committee as the principal decision-making forum. However, the Council's governance and decision-making arrangements must be complied with and there are circumstances set out elsewhere in this Constitution which provide for, in some circumstances, Officer delegations and Full Council decision-making.
- 2.8 The Protocol applies equally to these alternative forms of decision-making.

### **3.0 THE GENERAL ROLE AND CONDUCT OF MEMBERS AND OFFICERS**

- 3.1 Members and Officers have different but complimentary roles. 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. A successful relationship between Members and Officers will be based upon mutual trust, understanding and respect of each other's positions.
- 3.2 Both Members and Officers are guided by Codes of Conduct. The Localism Act 2011 sets out a duty for each Local Authority to promote and maintain high standards of conduct by Members and to adopt a Local Code of Conduct. The Codes of Conduct adopted by Worthing Borough Council and Adur District Council are consistent with the principles of selflessness, integrity, objectivity, accountability, openness, honesty and leadership.
- 3.3 The Codes of Conduct embrace the standards central to the preservation of an ethical approach to Council business, including the need to register and disclose interests, as well as appropriate relationships with other Members, Officers, and the public. Many Local Authorities have adopted their own, separate Codes relating specifically to planning, although Worthing Borough Council and Adur District Council have agreed to adopt the LGA Probity in Planning Guidance, which is summarised in this Protocol. This Protocol

should always be cross-referenced with the Council's substantive Code of Conduct.

- 3.4 Officers and Members must not act as agents for people pursuing planning matters within their Authority, even if they are not involved in the decision-making on it.
- 3.5 The determination of a Planning Application 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 Ombudsman on grounds of maladministration or a breach of the Council's Code of Conduct.

#### **4.0 REGISTRATION AND DISCLOSURE OF INTERESTS**

- 4.1 The Localism Act 2011 places requirements on Members regarding the registration and disclosure of their pecuniary interests and the consequences for a Member taking part in consideration of an issue in the light of those interests. The definitions of disclosable pecuniary interests are set out in the Relevant Authorities (Disclosable Pecuniary Interests) Regulations 2012. 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 Member or Co-opted Member has a disclosable pecuniary interest, are criminal offences.
- 4.2 Advice should always be sought from the Council's Monitoring Officer in respect of disclosable pecuniary interests. Ultimately, however, responsibility for fulfilling the requirements rests with each Member.
- 4.3 The provisions of the Act seek to separate interests arising from the personal and private interests of a Member from those arising from the Member's wider public life. Members 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 Member's involvement would be appropriate.
- 4.4 For information as to what interests need to be disclosed, reference should be made to the Council's Code of Conduct for Members. All disclosable interests should be registered under 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 when it relates to an item under discussion.
- 4.5 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 Member becoming aware of such changes.

- 4.6 A disclosable pecuniary interest relating to an item under discussion requires the withdrawal of the Member from the Committee. In certain circumstances, a dispensation can be sought from the appropriate body or Officer to take part in that particular item of business, but further advice should be sought from the Council's Monitoring Officer.
- 4.7 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.
- 4.8 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 Planning Committee, he or she should raise this with the Council's Monitoring Officer as soon as possible.

## **5.0 PREDISPOSITION, PREDETERMINATION OR BIAS**

- 5.1 Members of the Planning Committee (or 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. 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.
- 5.2 Clearly expressing an intention to vote in a particular way before a meeting (predetermination) is different from where a Member 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.
- 5.3 Section 25 Localism Act 2011 also provides that a Member 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 a particular matter.
- 5.4 This reflects the common law position that a Member may be predisposed on a matter before it comes to Committee, provided they remain open to listening to all the arguments and changing their minds in light of all the information presented at the meeting. Nevertheless, a Member 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 Member was biased.
- 5.5 If a Member 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.

- 5.6 The Councils have an Executive Member responsible within their portfolio for development and planning. This Member 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 the business, normally exclude themselves from decision-making Committees.

## **6.0 DEVELOPMENT PROPOSALS SUBMITTED BY MEMBERS AND OFFICERS AND COUNCIL DEVELOPMENT**

- 6.1 Proposals submitted by serving and former Members, Officers and their close associates and relatives can easily give rise to suspicions of impropriety. Proposals could be planning applications or Local Plan proposals.

- 6.2 Such proposals must be handled in a way that gives no grounds for accusations of favouritism. Any local planning protocol or code of good practice should address the following points in relation to proposals submitted by Members and Planning Officers:-

- If they submit their own proposal to the Authority they should play no part in its consideration;
- A system should be devised to identify and manage such proposals;
- The Council's Monitoring Officer should be informed of such proposals;
- Such proposals should be reported to the Planning Committee and not dealt with by Officers under delegated powers.

- 6.3 A Member would undoubtedly have a disclosable pecuniary interest in their own application and should not participate in its consideration. They do have the same rights as any applicant in seeking to explain their proposal to an Officer, but the Member, as applicant, should also not seek to improperly influence the decision.

- 6.4 Proposals for a Council's own development should be treated with the same transparency and impartiality as those of private developers.

## **7.0 LOBBYING OF AND BY MEMBERS**

- 7.1 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.

- 7.2 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.
- 7.3 Whilst the common law permits predisposition, it remains good practice that when being lobbied, Members (and particularly Members of the Planning Committee) 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. In such situations, they could restrict themselves to giving advice about the process and what can and can't be taken into account.
- 7.4 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.
- 7.5 If any Member, whether or not a Planning Committee Member, speaks on behalf of a lobby group at the decision-making Committee, they would be well advised to withdraw once any public or Board Member speaking opportunities had been completed, in order to counter any suggestion that Members of the Committee may have been influenced by their continuing presence.
- 7.6 It is sometimes difficult to get 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. However, it cannot be stressed too strongly, that the striking of this balance is, ultimately, the responsibility of the individual Member. Further specific issues relating to lobbying are as follows:-
- Planning decisions cannot be made on a party political basis in response to lobbying; the use of political whips to seek to influence the outcome of a planning application is likely to be regarded as maladministration.
  - Planning Committee or Local Plan Steering Group Members should in general avoid organising support for or against planning application, and avoid lobbying other Members. Members should not put pressure on Officers for a particular recommendation or decision, and should not do anything which compromises, or is likely to compromise, the Officers' impartiality or professional integrity.
  - Call-in procedures, whereby Members can require a proposal that would normally be determined under the delegated authority to be called in for determination by the Planning Committee, should require the reasons for call-in to be recorded in writing and to refer solely to matters of material planning concern.

7.7 As previously outlined, Members must always be mindful of their responsibilities and duties under their local Codes of Conduct. These responsibilities and duties apply equally to matters of lobbying as they do to the other issues of probity explored elsewhere in this Protocol.

## **8.0 PRE-APPLICATION DISCUSSIONS**

8.1 Pre-application discussions between a potential applicant and a Member can benefit both parties and are encouraged. However, it would be easy for such discussions to become, or be seen by objectors to become, part of a lobbying process on the part of the applicant.

8.2 The Localism Act has given Members much more freedom to engage in pre-application discussions. Nevertheless, in order to avoid perceptions that Members might have fettered their discretion, such discussions should take place within clear, published guidelines.

8.3 The following guidelines should be adhered to:-

- Clarity at the outset that the discussions will not bind a 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 may be at hand, nor will formal consultations with interested parties have taken place.
- An acknowledgement that consistent advice should be given by Officers based upon the development plan and material planning considerations.
- Officers should be present with Members in pre-application meetings. Members should avoid giving separate advice on the development plan or material considerations as they may not be aware of all the issues at an early stage. Neither should they become drawn into any negotiations, which should be done by Officers (keeping interested Members up to date) to ensure that the Authority's position is coordinated.
- Confirmation that a written note should be made of all meetings. An Officer should make the arrangements for such meetings, attend and write notes. A note should also be taken of any phone conversations, and relevant emails recorded for the file. Notes should record issues raised and advice given. The note should be placed on the file as a public record. If there is a legitimate reason for confidentiality regarding a proposal, a note of the non-confidential issues raised or advice given can still normally be placed on the file to reassure others not party to the discussion.

- A commitment that care will be taken to ensure that advice is impartial, otherwise the subsequent report or recommendation to Committee could appear to be advocacy.
- The scale of proposals to which these guidelines would apply. Members talk regularly to constituents to gauge their views on matters of local concern.

## **9.0 OFFICER REPORTS TO COMMITTEE**

9.1 As a result of decisions made by the Courts and Ombudsman, Officer reports on planning applications must have regard to the following:-

- Reports should be accurate and should include the substance of any objections and other responses received to the consultation.
- Relevant information should include a clear assessment against the relevant development plan policies, relevant parts of the National Planning Policy Framework, any local finance considerations, and any other material planning considerations.
- Reports should have a written recommendation for a decision to be made.
- Reports should contain technical appraisals which clearly justify the recommendation.
- If the report's recommendation is contrary to the provisions of the development plan, the material considerations which justify the departure must be clearly stated. Failure to do so may constitute maladministration or give rise to a Judicial Review challenge 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 38A of the Planning and Compensation Act 2004 and Section 70 of the Town and Country Planning Act 1990.
- Any oral updates or changes to the report should be recorded.

## **10.0 PUBLIC SPEAKING AT PLANNING COMMITTEES**

10.1 Reference is made to the Protocol on Public Speaking at the Planning Committee, to be found within Part 5 of the Constitution.

## **11.0 DECISIONS WHICH DIFFER FROM A RECOMMENDATION**

11.1 The law requires that decisions should be taken in accordance with the development plan, unless material considerations indicate otherwise. This



applies to all planning decisions. Any reasons for refusal must be justified against the development plan and other material considerations.

- 11.2 The Courts have expressed the view that the Committee's reasons should be clear and convincing. The personal circumstances of an applicant or any other material or non-material planning considerations which might cause local controversy will rarely satisfy the relevant tests.
- 11.3 Planning Committees can, and often do, make a decision which is different from the Officer recommendation. Sometimes this will relate to conditions or terms of a Section 106 obligation. Sometimes it will change the outcome, from an approval to a refusal or vice versa. This will usually reflect a difference in the assessment of how a policy has been complied with, or different weight ascribed to material considerations.
- 11.4 Planning Committees are advised to take the following steps before making a decision which differs from the Officer recommendation:-
  - Firstly, if a Member is concerned about an Officer recommendation, they should discuss their area of difference and the reasons for that with Officers in advance of the Committee meeting;
  - Recording the detailed reasons as part of the mover's motion;
  - Adjourning for a few minutes for those reasons to be discussed and then agreed by the Committee;
  - Where there is concern about the validity of reasons, considering deferring to another meeting to have the putative reasons tested and discussed.
- 11.5 If the Planning Committee makes a decision contrary to the Officers' recommendation, a detailed minute of the Committee's reasons should be made and a copy placed on the application file. Members should be prepared to explain in full their planning reasons for not agreeing with the Officers' recommendation.
- 11.6 The Officer should also be given an opportunity to explain the implications of the contrary decision, including an assessment of a likely appeal outcome, and chances of a successful award of costs against the Council, should one be made.
- 11.7 All applications that are clearly contrary to the development plan must be advertised as such, and are known as 'departure' applications. If it is intended to approve such an application, the material considerations leading to this conclusion must be clearly identified, and how these considerations justify overriding the development plan must be clearly demonstrated.
- 11.8 The application may then have to be referred to the relevant Secretary of State, depending upon the type and scale of the development proposed. If the

Officers' report recommends approval of such a departure, the justification for this should be included, in full, in that report.

## **12.0 ANNUAL REVIEW OF DECISIONS**

- 12.1 It is good practice for Members to visit a sample of implemented planning permissions to assess the quality of the decisions and the development. This should improve the quality and consistency of decision-making, strengthen public confidence in the planning system, and can help with reviews of planning policy.
- 12.2 Reviews should include visits to a range of developments such as major and minor schemes, upheld appeals, listed building works and enforcement cases. Briefing notes should be prepared on each case. The Planning Committee should formally consider the review and decide whether it gives rise to the need to reconsider any policies or practices.

## **13.0 COMPLAINTS AND RECORD KEEPING**

- 13.1 So that complaints may be fully investigated and as general good practice, record keeping should be complete and accurate. Every planning application file should contain an accurate account of events throughout its life. It should be possible for someone not involved in that application to understand what the decision was, and why and how it had been reached. This applies to decisions taken by Committee and under delegated powers, and to applications, enforcement and development plan matters.