

Planning Control Committee

Decision Making Protocol

Introduction

This Protocol is intended to provide assistance to members in reaching planning decisions. It is designed to support the high standards of ethics and probity as enshrined in the Members Code of Conduct and 'The Probity in Planning Code of Conduct' both of which form part of the constitution of the Council. This Protocol is intended to promote good administration, ensuring that any decisions are taken only in accordance with law, policy and appropriate guidance. In having regard to these principles, members will be exercising their functions in a way that promotes good governance whilst safeguarding the Council in the event of legal challenge.

1. Legal Background

1.1 The Local Planning Authority (LPA) must conduct its functions in accordance with the Planning Acts and regulations made under them. Court decisions on cases also provide additional interpretations as to how the Acts and regulations should be applied. Failure to carry out decision making against this background can result in the Council's actions being challenged in the courts.

1.2 One of the key issues and central to the Planning system is the **regulation of development and use of land in the public interest**. Planning Regulation is not there to protect the private interests of one person or group from the activities of another. 'Public Interests' include all public interests in the broadest sense, including national public interest, not necessarily only local interests.

1.3 The statutory framework of the planning system comprises the following:-

- Town and Country Planning Act 1990 (as amended)

This Act is wide ranging, forming the basis of the planning system in England & Wales. It covers issues such as the system of Development Plans, definition of 'development', the issue of planning permission, the enforcement regime in the event that planning control is breached and the appeals process.

- Planning (Listed Buildings and Conservation Areas) Act 1990

This Act deals with special requirements applying to Listed Buildings and Conservation Areas, including a separate enforcement regime for listed buildings.

- Planning and Compulsory Purchase Act 2004

This Act made modifications to the Development Plan system, updated aspects of the Town and Country Planning Act (and modified the rules on compulsory purchase matters).

- Planning Act 2008

This Act introduced a national body known as the Infrastructure Planning Commission which was designed to consider planning applications of strategic national importance such as airport terminals or power stations. The future of this body is presently under review.

1.4 In addition to the statutory framework set out above, secondary legislation is also of importance. This is generally issued by a Minister with parliamentary approval and has the full force of law. Some of particular importance are set out below:-

- Town and Country Planning (Use Classes Order) 1987

This Order designates certain uses. A change may be made between uses without planning permission provided it is in the same use class.

- Town and Country Planning (General Permitted Development) Order 1995

This Order sets out various types of development for which planning permission is not required.

- Town and Country Planning (General Development Procedure) Order 1995

These regulations set out the detail of the application and appeals processes.

There are further regulations governing advertisements, and other matters.

- 1.5 In addition to legislation, when taking decisions members should also have regard to relevant Circulars and Planning Policy Statements issued by the Secretary of State. Whilst these have the status of guidance rather than law, it must be considered and generally complied with unless material circumstances dictate otherwise.
- 1.6 It is also relevant to have regard to other sources, such as letters issued by Chief Planning Officer at the Department of Communities and Local Government and Ministerial Statements. Again although these do not have the status of law, compliance with them is good practice and tends to show that the law has been complied with in the absence of any indication to the contrary.
- 1.7 Whilst court decisions on planning matters can be a relevant consideration depending on the particular context, members should be aware that each application is to be taken on its own particular merits, taking into account the specific facts of the particular application, viewed in the context of relevant planning policy.
- 1.8 A central reference point within the planning system is the Development Plan. This currently consists of The Bury Unitary Development Plan ('UDP') and Regional Spatial Strategy for the North West. The UDP is in the process of being replaced by The Local Development Framework, until this process is completed, policies in the UDP will continue to apply. The Government has expressed an intention to abolish Regional Spatial Strategies but until formal action is taken by the Government to remove them through legislation, they remain to be taken into account as a material planning consideration.
- 1.9 Section 38(6) of the Planning and Compulsory Purchase Act 2004 states that
 - v *"If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts, the determination must be made in accordance with the plan unless material considerations indicate otherwise."*
- 1.10 This statutory requirement places great importance on the development plan (currently the Unitary Development Plan and its policies) in planning decisions. It does recognise, however, that LPAs can make decisions contrary to the provisions of the development plan **as long as there are sound material planning reasons to do so.**
- 1.11 Where decisions are not made in accordance with the development plan and there are justified reasons for departure from development

plan policies, special procedures apply requiring reference of cases to the Secretary of State.

1.12 LPAs must ensure that their decisions are consistent with Government Policy. The Unitary Development Plan and its policies must therefore also be consistent with Government Policy. Therefore there will only be exceptional instances where decisions are not in accordance with the Unitary Development Plan.

1.13 Planning policy currently exists in a number of forms including - Government

- ∨ Planning Policy Statements (PPS's)
- ∨ Planning Policy Guidance Notes (PPG's)
- ∨ CLG Circulars

Regional Requirements

- ∨ Regional Spatial Strategies

Local Planning Policy

- ∨ Unitary Development Plan (UDP)
- ∨ Local Development Framework (to replace UDP and is being produced currently)
- ∨ Supplementary Planning Guidance (SPG's)

1.14 In summary, the process of decision making must start with the provisions of the development plan and its policies. Decisions therefore must as a matter of course consider the respective policies and material planning considerations and as a rule developments should accord with the development plan and its provisions.

2. Material Planning Considerations

2.1. The considerations that are relevant to granting or refusing Planning permission are documented in PPS1 but have also been developed through legal precedents and government statements and circulars.

2.2. Planning decisions will be a matter of balancing all the material considerations. However, it is well established that the weight that is given to any specific issue will be an important factor. For example the decision maker may consider that the community benefits of any particular development may outweigh adverse impacts on individuals and "on balance", permission should be granted. Equally the impact on neighbours may be considered to be so adverse that the needs of the applicant, although legitimate, should be given less weight and permission refused.

2.3. Below are examples of material planning considerations, which must be balanced in the consideration of any proposal in the granting or refusal of planning permission:-.

- ∨ The safeguarding of land for a road widening scheme
- ∨ The protection of an ancient monument
- ∨ The likelihood of a development being carried out
- ∨ The risk of flooding to neighbouring landowners
- ∨ Disturbance or annoyance to neighbouring properties
- ∨ Planning history of a site including past and current uses
- ∨ Planning gain/obligations – secured through a s106 agreement. These must reasonably relate to the development proposed.
- ∨ Consultee responses
- ∨ Representations
- ∨ Environmental Impact Assessment
- ∨ Other environmental matters – contaminated land, air and noise pollution
- ∨ The water environment
- ∨ Listed Buildings, Conservation Areas and archaeology
- ∨ Residential amenity – including loss of privacy, excessive overlooking, overbearance by buildings that are too close
- ∨ Design – the height, appearance, materials, scale, proportion and relevance to their setting i.e. a 'sense of place'
- ∨ Highways – in terms of safety, access, traffic generation and public rights of way
- ∨ Public safety and crime prevention
- ∨ Personal circumstances (except where the other determining factors and material considerations are not decisive).
- ∨ Material factors on the ground (taking each case on the particular merits).

2.4 However it must be appreciated that the above list is not exhaustive, it changes from time to time as a result of court decisions and does not detract from the point that each application must be considered on its own particular merits.

2.5. Below are examples of considerations by the courts held to be immaterial and therefore not relevant to planning:

- ∨ Precedent – each case is treated on its own merits
- ∨ Land values
- ∨ Financial considerations
- ∨ Financial viability (except where a failure to grant planning permission would result in a building being left unoccupied and derelict)
- ∨ Loss of view

- ∨ Market competition
- ∨ Development already having been carried out
- ∨ Where other regulatory functions exist to provide controls
- ∨ Private rights of way
- ∨ Restrictive covenants
- ∨ Bias, discrimination or moral judgements

2.6 To summarise the position on material planning considerations:-

- Considerations must relate to planning purposes (which can change over time)
- Each application is to be considered on the merits
- It is matter of law (or policy) as to which factors are capable of being material in any particular application
- It is a matter of fact whether a factor capable of being a material consideration is so in any particular application
- The weight given to these considerations is for members to decide.

3. Weight to be given to Material Planning Considerations

3.1 Provided relevant material factors are considered, it is up to the members (as decision takers) what weight to attach to any particular factor.

4. The Decision Making Process

4.1 Section 70 Town and Country Planning Act 1990 provides that the LPA 'may grant planning permission, either unconditionally or subject to such conditions as they think fit, or they may refuse planning permission' and that they '**shall** have regard to the provisions of the Development Plan, so far as material to the application and other material considerations'.

4.1 Section 38 Planning & Compulsory Purchase Act 2004 provides that 'if regard is to be had to the Development Plan for the purpose of any determination to be made under the Planning Acts, the determination must be in accordance with the plan, unless material considerations indicate otherwise'.

4.2 The result of these provisions is that the Development Plan is the starting point for planning decisions, provided it is up to date and accords with national planning policies as outlined in guidance such as PPS1, PPS11 and PPS12.

- 4.3 In addition to the above, see 'Role of Members in the Decision Making Process' below.

5. Role of Members in the Decision Making Process

- 5.1 Members of Local Planning Authorities have a duty to take into account any representations made to the Council as a result of consultation with interested bodies, or as a result of public notices or neighbour notification. In doing so it is necessary to decide which representations are material to the decision to be made, and what weight to attach to them. This conclusion should not be reached until all the facts in the Chief Planning Officer's report have been considered, and any new relevant information presented at the Planning Control Committee has been taken into consideration.
- 5.2 Planning decisions involve balancing:
- ∨ The needs and interests of individual constituents and the community, with
 - ∨ The need to maintain an ethic of impartial decision-making
 - ∨ Planning decisions should not be made for political purposes or gain
- 5.3 Planning decisions are not based on an exact science. Rather, they rely on informed judgement within a firm policy context. Decisions can be highly controversial as they affect the daily lives of everyone. This is heightened by the openness of the system, which invites public opinion, engages in public participation before making a decision, all set against a legal backdrop of case law, UDP, policies and decision notices. It is important, therefore, that the process is characterised by open and transparent decision-making.
- 5.4 Councillors and officers have different but complementary roles. Both serve the public but councillors are responsible to the electorate, whilst 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. It follows that instructions may only be given to officers through a decision of the Council or its Executive or a Committee. Any other system which develops is open to question. A successful relationship between councillors and officers can only be based upon mutual trust and understanding of each others roles and positions. This relationship and the trust which underpins it must never be abused or compromised.
- 5.5 Members 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 serve on a planning committee.

- 5.6 Members are required to consider relevant information presented at the Committee meeting and base their judgement on such relevant information, the officer report together with any relevant information gleaned from the debate during the meeting.
- 5.7 Members and Officers will not accept any additional written material at the Committee meeting This is so that the decision making process is wholly transparent to the applicant, any objector and the public at large.

6. The Officer Report and Recommendation

- 6.1 Committee reports are written to incorporate all material planning considerations. Whilst sometimes lengthy, it is important that the reports evidence that all material considerations have been fully taken into account. The report serves as an audit trail which explains and supports the final decision.
- 6.2 The report includes a short summary of the reasons for reaching a given recommendation.
- 6.3 The recommendation will be based on material planning considerations (see below) with reference to:-
- ∨ National Planning Policy and Government advice
 - ∨ The Development Plan and local planning policies
 - ∨ Material planning considerations
 - ∨ Views of consultees
 - ∨ Material factors `on the ground`
- 6.4 Whilst approaching each application on its particular merits, members should take a systematic approach to determining applications along the following lines:-
- start with policies in the Development Plan
 - look at any other relevant policy considerations
 - take into account the results of technical consultation (e.g. Environment Agency)
 - take into account all other views – if material
 - look at the application on its own merits and in its particular context
 - come to a view in the light of officer assessment and recommendation.

- 6.5 The refusal of planning permission must be accompanied by a planning reason for refusal and this must include reference to a given Planning policy relevant to the reason for refusal (see below).
- 6.6 In cases where the recommendation is to approve there will also be a list of appropriate planning conditions, which are designed to both clarify the precise nature of the approval and impose relevant restrictions on the development.
- 6.7 Conditions that are attached to the grant of a planning permission must be in accordance with Circular 11/95 and must be
- ∨ Necessary
 - ∨ Relevant to planning
 - ∨ Relevant to the development proposed
 - ∨ Enforceable
 - ∨ Precise
 - ∨ Reasonable in all other respects
- 6.8 In considering whether a particular condition is necessary, LPAs should ask themselves whether planning permission would have to be refused if that condition were not imposed. If it would not, then the condition needs special and precise justification.

7. Reasons for Refusal

- 7.1 Any refusal of Planning permission **must** be accompanied by reasons for refusal which must be based on planning grounds. It is an established requirement that all reasons for refusal must include reference to and be supported by planning policies from the Development Plan.
- 7.2 Any reasons must be valid in terms of planning law.
- 7.3 The decision must be based upon an assessment of all material considerations concerning the application.
- 7.4 The decision may be the subject of appeal to the Secretary of State. In such a case the Council shall be required to defend the decision reached by the committee, so it is of vital importance that reasons are based on planning grounds alone.
- 7.5 The Council will generally be required to cover its own costs that are incurred (such as professional fees for counsel and consultants) and

are at risk of paying costs of the appellant should an appeal be successful.

- 7.6 The risk of costs claims are reduced by ensuring that decisions are properly made and backed by defensible planning reasons for refusal.
- 7.7 One good planning reason may be sufficient to justify refusal of an application (depending on the particular situation).

8. The Committee Briefing

- 8.1 The practice in Bury is that the Chairman is given a detailed briefing a few days before the Planning Committee convenes. A briefing for the whole committee is also scheduled immediately prior to the actual Committee meeting taking place.
- 8.2 It is important that decisions are only made in the actual committee meeting itself, taking into account all the information supplied together with conclusions reached following public speaking and any debate by the Committee.
- 8.3 The briefing is **not** intended to facilitate collusion on the outcomes, but is rather an opportunity for officers to provide further explanation of the items and allow Members to raise any questions or seek advice on either the substance of reports or procedural matters.
- 8.4 This is a valuable forum for seeking advice and in the Review of the service conducted in 2005, this procedure was acknowledged as a sound practice, entirely consistent with a proper decision making process.

9. Raising of concerns about recommendations

- 9.1 There are a number of opportunities for Members to raise concerns about planning applications, prior to the actual Committee meeting:
 - ∨ All Ward Members are notified by email when an application is registered.
 - ∨ During the consultation process there are opportunities for representations to be made.
 - ∨ The Agenda is published at least 5 working days before the Committee date and is available in either hard copy or on the Council website.
 - ∨ The Planning Committee briefing.

9.2 All Members are encouraged to contact the Chief Planning Officer (or nominated deputy) to raise any concerns and these can be included within the written report to the Planning committee.

9.3 Advice can also be sought about the options for alternative decisions to those that are being recommended by Officers. It is highly recommended that advice is obtained in advance of the meeting itself if at all possible. If this is not the case, say for example following a site visit, then the briefing should be used to highlight concerns.

10. Contact with Applicants, Developers and Objectors

10.1 Members of the Planning Committee should refer those who approach you for planning, procedural or technical advice to officers.

10.2 Members of the Planning Committee shouldn't agree to any formal meeting with applicant's developers or groups of objectors where it can be avoided. Where it is felt that a formal meeting would be useful in clarifying the issues, Planning Members should never seek to arrange such a meeting but should request the Chief Planning Officer to organise it. The officer(s) will then ensure that those present at the meeting are advised from the start that the discussions will not bind the authority to any particular course of action, that the meeting is properly recorded on the application file and the record of the meeting is disclosed when the application is considered by the Committee.

10.3 Members of the Planning Committee should otherwise:

- follow the rules on lobbying;
- consider whether or not it would be prudent in the circumstances to make notes when contacted; and
- report to the Chief Planning Officer any significant contact with the applicant and other parties, explaining the nature and purpose of the contacts and your involvement in them, and ensure that this is recorded on the planning file.

10.4 Members of the Planning Committee continue to be bound by the provisions of the Members Code of Conduct and should ensure that high standards of ethical probity are not only upheld but are seen to be upheld. Planning Committee members who are approached by members of the public to advise on planning matters may wish to involve fellow ward members in responding to such queries.

In addition in respect of presentations by applicants/developers:

- 10.5 Planning Members shouldn't attend a planning presentation unless an officer is present and/or it has been organised by officers. Planning Members may ask relevant questions for the purposes of clarifying their understanding of the proposals.
- 10.6 Ward Members have speaking rights at the Planning Committee and can use this opportunity to represent the views of constituents.
- 10.7 Members are urged to seek guidance from the Council Solicitor in any particular instance where clarification on these matters may be required.

11. Procedure in the Committee meeting.

- 11.1 Planning Members should remember that although any presentation is not part of the formal process of debate, it is likely to raise issues which are material considerations to be taken into account in considering and coming to a determination of any subsequent application.
- 11.2 Planning Members should be aware that a presentation is a form of lobbying and Planning Members must not express any strong view or state how you or other Members might vote until the Chief Planning Officer has had an opportunity to respond to any presentation.
- 11.3 Members are reminded that the Council allows a ward member to address the committee on any application together with one person representing the applicant and one representing the objectors. Contributions from members of the public and ward members at the committee are time limited to three minutes.
- 11.4 Planning decisions are made on the basis of a simple majority. Any decision may be deferred pending a site visit
- 11.5 From time to time the Council's Planning Committee will disagree with professional advice given by officers and will indicate an intention to determine a planning application contrary to that advice.
- 11.6 The Association of Council Secretaries and Solicitors' *'Model Planning Code'* advises Planning Committees to take the following steps prior to making a decision contrary to officers' recommendations:
- ∨ Encouraging the formation of tentative reasons by discussing a predisposition with planning officers beforehand;
 - ∨ Writing down the reasons as part of the mover's motion;
 - ∨ Adjourning for a few minutes for those reasons to be discussed;

- ∇ If there is a very strong objection from officers on the validity of the reasons, consider deferring the item to another meeting to have the putative reasons tested and discussed.
- 11.7 In such cases where the Chair of the Committee believes Members may be inclined to decide contrary to officer advice he/she should invite a Member to move such a proposal **with reasons** and for another Member to second this proposal
 - 11.8 Where no such proposal (contrary to officer advice with reasons) is moved and seconded, the Chair may remind members that if there is no counter proposal on the table, they will by default have indicated an intention to be bound by the officers recommendation. The Chair may further remind members that to vote against officers recommendation on the substantive motion in such circumstances, could have adverse implications for the Council in terms of potential judicial review proceedings or a complaint to the Local Government Ombudsman. The Chair may proceed again to invite members to move and second any counter proposal (with reasons) before moving to vote on the substantive motion
 - 11.9 Where a proposal to refuse with reasons is moved and seconded, then a vote shall be taken
 - 11.10 If the vote carries the proposal to refuse then permission is refused
 - 11.11 If the vote does not carry the proposal to refuse, then the Chair should advise members that by implication they are therefore minded to follow the original officer recommendation and that any subsequent vote against the original recommendation would be considered to be perverse and likely to bring the Council, the Committee and members themselves into disrepute. The Chair shall then proceed to call a vote on the original recommendation.
 - 11.12 There shall be only one vote on any motion against officer recommendation and if it fails only one vote on the original recommendation.
 - 11.13 There is no reason in law why the Planning Committee may not make decisions on planning applications contrary to officer's recommendations, whether they be for approval or refusal. However, the law requires that decisions must be taken in accordance with the Development Plan unless material considerations indicate otherwise. Furthermore members should observe the 'Wednesbury principle' (the case of Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223) which, put simply, requires all relevant

information (i.e. material considerations) to be taken into account and all irrelevant information (i.e. non-material matters) to be ignored. Decisions referred to committee are for members to make but in doing so they need to act in a reasonable way (in the Wednesbury sense).

- 11.14 The law also requires in the case of refusals of planning permission that detailed reasons are given, and it is clearly important that where Members have made a decision contrary to an officer's recommendations the reason(s) for the decision should be made clear, **prior to a vote being taken**, so that there is no suspicion of the decision being made for non-planning reasons. Before the decision is confirmed officers shall be given an opportunity to explain to the Planning Committee the planning and/or legal implications of their intended decision and that a copy of the decision will be placed on the planning file.
- 11.15 If no sound reasons are immediately apparent then members may defer the matter for further investigation or return to the original officer recommendation
- 11.16 It is recognised good practice that when the Planning Committee makes a decision contrary to officer recommendation, whether the decision is to approve or refuse permission, the planning reasons should be clearly minuted.
- 11.17 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 considerations which might cause local controversy will rarely provide such grounds.
- 11.18 To summarise, any decision against officer recommendation should:-
- * ensure the justification for the decision is properly minuted
 - * ensure the Decision Notice refers to policies in the Development Plan
 - * ensure that reasons are valid in terms of planning law
 - * any conditions also require justification and these may also be subject to appeal.

12. The appeal process

- 12.1. The applicant is allowed a right of appeal to the Secretary of State against a decision of the LPA and has 6 months in which to lodge the appeal from the date of the decision (12 weeks in the case of householder development). This process is handled through the Planning Inspectorate.

- 12.2. Third parties and other interested parties have no rights of appeal. There is however a possibility of Judicial Review of any decision through High Court action, but only to establish that the decision was made contrary to law or procedure. This action cannot be used to challenge the merits of the development.
- 12.3. The process of appeal is by either, written representations, Local Hearing or a Public Inquiry but in each case, either party can seek costs against the other for unreasonable behaviour.
- 12.4. Award of costs is not based on simple redress if the appeal is successful. Costs are only awarded where it is established that either side has behaved unreasonably e.g.:-
 - ∇ Late submission of evidence or withdrawal from the case
 - ∇ Failure to adequately support all the reasons for refusal.
- 12.5. The appeal process is managed by officers of the Council

13. Site Visits

- 13.1 Members are referred to the 'Probity in Planning Code of Conduct' which forms part of the constitution of the Council and to which members of the planning committee are bound to subscribe.
- 13.2 There is a requirement that site visits be authorised by a resolution of the planning committee.
- 13.3 Only planning committee members, appropriate ward members and officers are authorised to take part in site visits
- 13.4 Appendix 1 to the 'Probity in Planning Code of Conduct' consists of a Site Visit Protocol which sets out procedure governing site visits and for ease of reference is appended hereto.

24th August 2010

**APPENDIX 1 FROM 'PROBITY IN PLANNING CODE OF CONDUCT'
(Copy extracted from the Council Constitution).**

PROTOCOL FOR SITE VISITS

In order to ensure that all official member site visits relating to planning matters are dealt with consistently and fairly the following code of practice will apply:-

1. Site visits shall only be held following a resolution of the Planning Control Committee or as may otherwise be authorised by the Chair in consultation with the Chief Planning and Economic Development Officer and should be restricted to allowing members to visualise the development.
2. Site visits shall only be attended by the appointed Councillors and relevant Ward Members along with the appropriate Council officers.
3. Notification of applicant, supporters and objectors
The applicant, supporters and objectors shall be notified in writing of the date, approximate time of the site visit and advise that the Committee will be visiting the site to familiarise themselves with the proposal.

Procedure at site visit

The site meeting will be conducted in the following manner:-

- (a) The Chief Planning and Economic Development Officer shall introduce the Chair of the Planning Control Committee and explain the purpose of the site visit to all present.
- (b) The applicant(s) shall then be invited to explain the proposal to the members present and respond to any questions from member/officers,
- (c) The objectors shall then be invited to explain the reasons for their concerns, objections or views on the proposal and respond to any questions.
- (d) No decision and planning application will be taken at the site visit meeting and no indication of the likely outcome of the application will be

given at the Site visit. The full Planning Control Committee which meets in the evening, only decides on the application.

(e) A note of all people in attendance at the site visit shall be taken by the representative of the Democratic Services Section. Members should not allow themselves to be addressed by the applicant or objectors in separate groups during the site visit. In addition questions should only be asked during the formal part of the site visit (ie where an officer is present).

All members should attend at the same time. Members do not attend on their own or in small separate groups.

