

STANDARDS COMMITTEE

3 FEBRUARY 2021

REPORT OF THE MONITORING OFFICER

A.1 MEMBERS' PLANNING CODE/PROTOCOL

(Report prepared by Lisa Hastings)

PART 1 – KEY INFORMATION

PURPOSE OF THE REPORT

To review the Council's Members' Planning Code/Protocol adopted in 2015 following the Local Government Association (LGA) Probity in Planning Guidance – Advice for councillors and officers making planning decisions issued in December 2019.

EXECUTIVE SUMMARY

In December 2019, the LGA issued its Probity in Planning Guidance – Advice for Councillors and Officers making planning decisions, which is included as Appendix A. The Standards Committee agreed through its work programme to review the Council's Planning Protocol following the LGA publication.

The LGA's Guidance was circulated to members of the Planning Committee in 2020. The Committee members were also later provided with a note on lobbying following a High Court decision involving the London Borough of Hackney, which confirmed the Council's Protocol was consistent with the practices established within the judgement, so long as it is done openly.

Officers have undertaken a review of the Council's Planning Protocol following both the LGA's Guidance and High Court decision, and it is considered that the recommended practice as set out within the advice and guidance issued by the LGA is covered within the Council's existing Protocol, Members' Code of Conduct and working practices. Consequently, no further changes are being suggested as a result of the LGA's guidance however, it is necessary to include additional wording within the Planning Protocol to cover situations when it is not possible to undertake Site Visits and to clarify this does not impact upon the Planning Committee's ability to determine planning applications.

It is also recommended regular training should be carried out to ensure the principles of Probity in Planning are known and fully understood by Councillors involved with planning decisions.

The LGA Guidance does state that particular care needs to be taken in the use of social media by both Officers and Councillors, where it relates to decision making functions. The use of social media is also an area which has been highlighted by the Local Government Ethical Standards Report published in 2019 and the LGA in its recent work to publish a Model Code of Conduct. Any training delivered for Tendring District Councillors should include a section on using social media.

RECOMMENDATION(S)

It is recommended that the Standards Committee:

1. Notes the contents of the Report and agrees no changes are required to the Council's adopted Members' Planning Protocol as a result of the LGA's Guidance;
2. Approves the recommended wording, as set out within the Report, to be added to the Member's Planning Protocol covering situations where it is not possible for organised Site Visits to be undertaken;
3. Agrees the amendments are minor in nature and follow the implications of the various Coronavirus Regulations in force during 2020 and supports the Monitoring Officer using her delegated powers in accordance with Article 14 of the Constitution;
4. Endorses awareness of the Council's Protocol and the LGA's Guidance on Planning Probity are covered within the regular training programmes for elected Members involved in planning decisions; and
5. Requests that Officers include a section on the use of social media in all training sessions for Members.

PART 2 – IMPLICATIONS OF THE DECISION

DELIVERING PRIORITIES

The Members' Planning Protocol forms part of the Council's Constitution and demonstrates effective and positive Governance arrangements and promotes the maintenance of integrity, both real and perceived within the Planning Committee's decision making as well as high standards of conduct.

FINANCE, OTHER RESOURCES AND RISK

Finance and Other Resources

Finance

None associated with the content of this report.

Risk

The Council must ensure that any Codes and Protocols which provide guidance for Councillors are up to date with current policy, legislation, case law, good practice and national guidance. The current Members' Planning Protocol was last reviewed in 2018 and it was essential to undertake a further review following the LGA's publication to minimise any risk that the Council's practices were not up to date. Up to date guidance will prevent confusion and legal challenges by way of judicial review to planning decisions based on failure to declare interests, predetermination or bias.

LEGAL

This Protocol follows best practice and assists the Council to fulfil its statutory duty to promote and maintain high standards of conduct for both members and officers.

The judgement of Mr Justice Dove can be found in R. (Holborn Studios Ltd) v. London Borough of Hackney [2020] EWHC 1509 (Admin).

The Planning Protocol is integrated within the Constitution at Part 6. The Monitoring Officer has delegated authority in accordance with Article 15 of the Constitution to make minor changes to the Constitution arising from new legislation. Although, the changes being recommended do not immediately stem from new legislation, they are necessary as a consequence of the COVID-19 pandemic and the restrictions which have been put in place through the various Regulations passed in 2020. Therefore, it is considered appropriate for the delegation to be used in this instance, the changes are very minor in nature and support the business continuity arrangements in place for the Planning Committee since March 2020.

OTHER IMPLICATIONS

Consideration has been given to the implications of the proposed decision in respect of the following and any significant issues are set out below.

Crime and Disorder/Equality and Diversity/Health Inequalities/Area or Ward affected/Consultation/Public Engagement.

Wards Affected: All

PART 3 – SUPPORTING INFORMATION

BACKGROUND

In 2015, the Council adopted the Members' Planning Code/Protocol which was subsequently reviewed in 2018. The Council's Protocol is based on the Model Council Members' Planning Code or Protocol produced by the national body "*Lawyers in Local Government (LLG)*". The Model Code was produced in accordance with the changes to the ethical framework in 2012 and guidance issued by the then DCLG.

The adopted Members' Planning Protocol forms Part 6 of the Constitution, relating to Codes and Protocols and is attached to the report as Appendix B.

CURRENT POSITION

Officers have undertaken a review of the Council's Members' Planning Protocol following both the LGA's Guidance and High Court decision, and it is considered that the recommended practice as set out within the advice and guidance issued by the LGA is covered within the Council's existing Protocol, Members' Code of Conduct and working practices. The Council's Protocol already makes reference to the Probity in Planning guidance previously issued by the LGA. Consequently, no further changes are being suggested as a result of the LGA's guidance however, it is necessary to include additional wording within the Members' Planning Protocol to cover situations when it is not possible to undertake Site Visits and to clarify this does not impact upon the Planning Committee's ability to determine planning applications. The Planning Advisory Service has suggested that local authorities should review their Planning Committee Protocols in respect of site visits as a consequence of the COVID-19 pandemic.

SITE VISITS:

It is important to note that site visits are not legal requirements for the determination of planning applications but are carried out in practice. As highlighted in Section 12 of the

LGA Guidance, local planning authorities should have a clear and consistent approach on when and why to hold a site visit and how to conduct it. Prior to the COVID-19 pandemic Tendring District Council undertook site visits for all applications to be determined by the Planning Committee and the Members' Planning Code & Protocol contains site visit provisions.

When the Government introduced the lockdown at the end of March and strict social guidelines thereafter, local planning authorities shortly thereafter received a letter from the Ministry of Housing, Communities and Local Government's Chief Planner advising Councils to continue with the determination of planning applications, decision making and adopting innovative approaches to ensuring the planning system continued to function, especially where this will support the local economy. Shortly thereafter, new legislation was passed to allow Councils to conduct formal meetings remotely.

As part of the Council's Business Continuity arrangements for decision making during these times, how site visits could be undertaken and the health and safety considerations was taken into account. It was accepted that the previous arrangements would not be appropriate and at the time were in breach of the strict social distancing requirements and travel restrictions, as well as considering whether Members of the Planning Committee were shielding.

Even though some of the social distancing measures have been relaxed, at times, over the last 10 months, the ability for Planning Committee members to travel together and attend a site visit along with others has still not been considered to be a safe practice (and at the time of this Report is prohibited under current lockdown arrangements). Reviews were undertaken throughout 2020 following new government guidance and Regulations coming into force. The Planning Inspectorate published guidance on site visits, updated on 12th January 2021, confirmed although Inspectors had re-started site visits these are only being undertaken where safe and appropriate to do so (with very limited numbers in attendance and strict social distancing and face coverings being worn).

Members have been actively encouraged to make their own independent visit to the site (subject to the prevailing national restrictions on travel) and view it informally and where it is safe to do so, some members do this on their own, and others go in small groups (subject to the restrictions in place at the relevant time). The Committee are also provided with video footage and extra images are being sought where either the Members or Officers feel it would be necessary to do so. All of this information is published on the Council's planning portal together with the application for openness and transparency.

The above arrangements were put in place through Business Continuity and it is recommended that an additional paragraph is included to cover situations where it is not possible to undertake site visits and if unable to do so, this does not impact on the Committee's ability to determine a planning application.

RECOMMENDED ADDITIONAL WORDING FOR SITE VISITS:

Section 7 of the Council's Planning Protocol sets out the provisions relating to Site Visits, it is recommended that at the end of the section the wording below is inserted. The Chairman of the Planning Committee has been consulted on the proposed wording and is in agreement with the recommendation:

"Exception to the Council's Local Practice of Undertaking Site Visits

- *Whilst it is the Council's standard local practice to undertake site visits, there will be*

exceptional circumstances, where an organised site visit is not possible.

- *Site visits are not legally required for the determination of planning applications but forms part of local practice, which protocols must clearly set out. If a site visit cannot be organised, due to exceptional circumstances, a planning application can still be determined by the Committee, so long as the guidance issued by the Council is adhered to.*
- *Should circumstances prevail where the Council has had to determine it is not possible to organise a site visit, Members of the Committee will be issued with guidance by the Monitoring Officer, which is relevant to the particular situation arising. Such guidance will take into account health and safety risk assessments, current legislation and central government guidance, including that issued by the Planning Inspectorate and/or the Chief Planning Officer.*
- *Although this Protocol will not set out the guidance to be issued, being dependent upon the circumstances at the time, alternative arrangements will ensure the Principles of Planning in Probity are maintained and observed so as not to prejudice the Council's decision making."*

LOBBYING:

The High Court ruled in 2020, for the first time, whether members of the public can write to councillors, and whether councillors can read those letters in advance of taking decisions. The case concerned the practice of the London Borough of Hackney of prohibiting planning committee members from reading correspondence sent to them about forthcoming applications. This is not the position at Tendring District Council, the Members' Planning Protocol follows national guidance and has put in place protections for Councillors when being lobbied. Such provisions include advising Councillors not to agree to any meetings with applicants or objectors, without officers being present and to make sure that if Planning Committee members are approached directly they should make it clear they must remain open minded to be able to participate in the decision making. Members of the Planning Committee are advised to forward lobbying material onto officers for protection, but they are not prevented from reading it. If Members have been lobbied this should be referred to at the meeting for openness and transparency.

The particular issue at the heart of the case was whether the public could write to councillors about decisions they will be making and whether those councillors could consider those representations. The point was remarkably free of any judicial authority, apart from a passing comment by Dove J in [R\(Legard\) v Royal Borough of Kensington and Chelsea](#) [1] that "*As democratically elected representatives they are expected to receive and consider representations and lobbying from those interested in the issues they are determining*".

Dove J referred to the LGA's publication "*Probity in Planning*" which says "*Lobbying is a normal part of the planning process*". It was "*indisputably correct*" that "*that issues in relation to freedom of expression and the application of Article 10 of the ECHR were engaged in the communication between members of a local authority, and in particular members of a planning committee, and members of the public who they represent and on whose behalf they were making decisions in the public interest*". He held (para 78):

"Similarly, bearing in mind the importance of the decisions which the members of the planning committee are making, and the fact that they are acting in the context of a democratically representative role, the need for the communication of views and opinions between councillors and the public whom they represent must be afforded significant weight. In my view, it would be extremely difficult to justify as

proportionate the discouragement, prohibition or prevention of communication between public and the councillors representing them which was otherwise in accordance with the law. Here it was no part of the defendant's case to suggest that the communication which the claimant made in their correspondence in respect of the committee report was anything other than lawful."

Mr Justice Dove concluded (para 79):

"Receiving communications from objectors to an application for planning permission is an important feature of freedom of expression in connection with democratic decision-taking and in undertaking this aspect of local authority business. Whilst it may make perfect sense after the communication has been read for the member to pass it on to officers (so that for instance its existence can be logged in the file relating to the application, and any issues which need to be addressed in advice to members can be taken up in a committee report), the preclusion or prevention of members reading such material could not be justified as proportionate since it would serve no proper purpose in the decision-taking process. Any concern that members might receive misleading or illegitimate material will be resolved by the passing of that correspondence to officers, so that any such problem of that kind would be rectified. In my view there is an additional issue of fairness which arises if members of the planning committee are prevented from reading lobbying material from objectors and required to pass that information unread to their officers. The position that would leave members in would be that they would be reliant only on material from the applicant placed on the public record as part of the application or the information and opinions summarised and edited in the committee report. It is an important feature of the opportunity of an objector to a planning application to be able to present that objection and the points which they wish to make in the manner which they believe will make them most cogent and persuasive. Of course, it is a matter for the individual councillor in the discharge of his responsibilities to choose what evidence and opinion it is that he or she wishes to study in discharging the responsibility of determining a planning application, but the issue in the present case is having the access to all the material bearing upon the application in order to make that choice. If the choice is curtailed by an instruction not to read any lobbying material from members of the public that has a significant impact on the ability of a member of the public to make a case in relation to a proposed development making the points that they wish to make in the way in which they would wish to make them.

The judgment establishes, surprisingly for the first time, the right of local councillors to receive correspondence from the public and to consider it when making decisions. Part of that is the right of the public to write. There is also a recognition that Members can and will be lobbied, whether in writing, in meetings, at social events or chatting in the street. Provided that is done openly, in particular that correspondence is copied to officers whether by the writer or the recipient, that is not simply legitimate, but an important part of the democratic process.

The Case is helpful for written correspondence, but does not extend to face to face communication. The reason why site visits in Tendring were structured in the way they were was to ensure maximum protection to Councillors in the decision making process to avoid any accusations of pre-determination, bias or taking into account irrelevant factors instead of material considerations for planning purposes. During the time in which Members of the Planning Committee are attending the sites without the officers in

attendance, advice would be to make it clear to anyone who does approach the Member, the importance of Planning Probity and maintaining impartiality at all times. For additional protection and maximum openness and transparency Planning Committee Members should notify those that approach them that they'll be declaring they've been lobbied at the Planning Committee meeting. Members of the Planning Committee were provided with this advice following the High Court decision.

BACKGROUND PAPERS FOR THE DECISION

There are no background papers arising from this report.

APPENDICES

Appendix A: Local Government Association Probity in Planning Guidance – Advice for Councillors and Officers making planning decisions issued in December 2019.

Appendix B - Model Council Members' Planning Code/Protocol