

STANDARDS COMMITTEE

19 JULY 2023

REPORT OF MONITORING OFFICER

A.2 MEMBERS' PLANNING CODE & PROTOCOL

PART 1 – KEY INFORMATION

PURPOSE OF THE REPORT

To consider whether a wider review of the Council's Members' Planning Code & Protocol adopted in 2015 and updated in 2021, should be undertaken following the request by Cabinet and Council to give further guidance to site visit procedures, reflecting upon whether a revised approach should be taken to produce an easier to understand document.

EXECUTIVE SUMMARY

In December 2019, the Local Government Association (LGA) issued its Probitry 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 Code & Protocol following the LGA publication.

Following the 2020/21 review no further changes were suggested as a result of the LGA's guidance however, additional wording was recommended 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 Council's current version of the Council's Planning Code and Protocol is attached as Appendix B.

Following the work of the Constitution Review Working Party (CRWP) in late 2022 and 2023, and recommendations from Cabinet, Full Council resolved at its meeting on 2nd March 2023 (minute no. 106):

- (d) *the Monitoring Officer be requested to amend the Council's procedure for Planning Committee Site visits, as set out in the Members' Planning Code and Protocol (in Part 6 of the Constitution) to appropriately reflect the matters raised by the Review of the Constitution Portfolio Holder Working Party; and*
- (e) *the Monitoring Officer be further requested to submit the Site Visit Procedure, as amended, to Full Council for its approval and adoption, following consultation, as appropriate and necessary, with the Planning Committee and the Standards Committee.*

The matters raised by the CRWP are contained within the body of this Report, in the Background Section, related to lobbying, site visits, training and links to the Code of Conduct. A definition of lobbying could easily be included and additional wording provided for site visits. The recent training of the Planning Committee Members, their substitutes and offered to all Members, was delivered in May 2023, and covered site visits. However, it is proposed that a wider review of the Council's Protocol is undertaken, not to alter the principles but to produce a more user friendly document.

Through the production of the Planning Probity Protocol for the Tendring Colchester Borders Garden Community Joint Committee in 2022, Appendix C, a different format was adopted, which was considered easier to follow. The Planning Advisory Service (PAS) through their website outlines some of the best practice they have found to assist Councils in reviewing their own codes of practice. Various examples are suggested for different elements, such as councillor involvement in pre-application advice, interests, lobbying, dealing with petitions, officer member relationships, ward councillor involvement, site visits, referral of delegated applications to Planning Committee, public speaking, training etc.

It is recommended that at this stage, rather than simply add wording to an existing Protocol, a fresh review is undertaken of the document.

RECOMMENDATION(S)

It is recommended that:

- (a) Notes the contents of the Report and that the Site Visit procedure was included within the recent mandatory training to Planning Committee Members, their substitutes and that this was available to all Members;**
- (b) gives consideration to the different approach adopted for the Planning Probity Protocol for the Tendring Colchester Borders Garden Community Joint Committee, and that the Planning Advisory Service suggests some best practice for Planning Committee Protocols following the LGA's Probity in Planning Guidance; and**
- (c) agrees to a review of the Council's Planning Protocol to ensure that it is adhering to best practice and easy to follow.**

REASON(S) FOR THE RECOMMENDATION(S)

In order to enable a review to be undertaken to ensure that, ultimately, the Council's Planning Protocol is easy to follow and makes use of current best practices.

ALTERNATIVE OPTIONS CONSIDERED

Not to undertake a review. However, this would equate to a missed opportunity to refresh the Protocol and to produce a more user friendly document.

PART 2 – IMPLICATIONS OF THE DECISION

DELIVERING PRIORITIES

The Members' Planning Code and Protocol forms part of the Council's Constitution in Part 6 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.

LEGAL REQUIREMENTS (including legislation & constitutional powers)

This Protocol follows sound principles 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 Code and Protocol is integrated within the Constitution at Part 6.

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 Planning Protocol was last reviewed in 2021 following, the LGA Probity in Planning Decision Guidance issued in 2019 and in a response to the procedures adopted during the COVID-19 Pandemic.

The Standards Committee have reviewed the Planning Code & Protocol as part of the Council's high standards and probity arrangements, it's important for councillors to be involved in planning discussions and plan making and on applications, on behalf of their communities in a fair, impartial and transparent way.

FINANCE AND OTHER RESOURCE IMPLICATIONS

None associated with the content of this report.

USE OF RESOURCES AND VALUE FOR MONEY

External Audit expect the following matters to be demonstrated in the Council's decision making:

- A) Financial sustainability: how the body plans and manages its resources to ensure it can continue to deliver its services;*
- B) Governance: how the body ensures that it makes informed decisions and properly manages its risks, including; and*
- C) Improving economy, efficiency and effectiveness: how the body uses information about its costs and performance to improve the way it manages and delivers its services.*

As such, set out in this section the relevant facts for the proposal set out in this report.

The following are submitted in respect of the indicated use of resources and value for money indicators:

A) Financial sustainability: how the body plans and manages its resources to ensure it can continue to deliver its services;	N/A
B) Governance: how the body ensures that it makes informed decisions and properly manages its risks, including; and	This is set out elsewhere within this report.
C) Improving economy, efficiency and effectiveness: how the body uses information about its costs and performance to improve the way it manages and delivers its services.	N/A

MILESTONES AND DELIVERY	
Standards Committee 19 July 2023 – Agree to undertake review.	
Standards Committee 11 October 2023 – Consider the outcome of the review and make recommendations to Full Council.	
Full Council 28 November 2023 – Council considers and adopts the proposed new Planning Protocol.	
ASSOCIATED RISKS AND MITIGATION	
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 2021 following the LGA’s publication to minimise any risk that the Council’s practices were not up to date. Up to date guidance prevents confusion and legal challenges by way of judicial review to planning decisions based on failure to declare interests, predetermination or bias. Through the Site Visit survey undertaken with Members in 2022/23, a number of questions were received and comments made, which could lead to the view the current version of the Code and Protocol could be revised to be easier to follow and a range of best practice nationally can be drawn up. The principles of the current version are sound.	
OUTCOME OF CONSULTATION AND ENGAGEMENT	
Possible consultees include:- The Independent Persons; Members of the Planning Committee; and Our Planning Service.	
EQUALITIES	
Part of the review of the Planning Protocol will be to ensure that it meets the requirements of the Public Sector Equality Duty in that the Council must, in the exercise of its functions, give due regard to the need to eliminate discrimination, harassment, victimisation, to advance equality of opportunity and foster good relations between those who share a protected characteristic and those who do not. The protected characteristics are age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race religion or belief, sex, sexual orientation.	
SOCIAL VALUE CONSIDERATIONS	
Not applicable to this report.	
IMPLICATIONS FOR THE COUNCIL’S AIM TO BE NET ZERO BY 2030	
Not applicable to this report.	
OTHER RELEVANT 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	None

Health Inequalities	None
Area or Ward affected	All

ANY OTHER RELEVANT INFORMATION

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.

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 High Court 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 attended the sites without the officers in attendance, advice is given 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.

The CRWP, Cabinet and subsequently, Full Council requested the Monitoring Officer to provide a definition of Lobbying.

What is lobbying?

Lobbying is when an individual or a group tries to persuade someone to support a particular policy or campaign. Lobbying can be done in person, by sending letters and emails or via social media.

Lobbying means, in a professional capacity, **attempting to influence**, or advising those who wish to influence, the UK Government, Parliament, the devolved legislatures or administrations, regional or local government or other public bodies on any matter within their competence.

The LGA's Probity in Planning states:

"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. As the Nolan Committee's 1997 report 13 states: 'It is essential for the proper operation of the planning system that local concerns are adequately ventilated. The most effective and suitable way that this can be done is through the local elected representatives, the councillors themselves'. Lobbying, however, can lead to the impartiality and integrity of a councillor being called into question, and so care and common sense must be exercised by all parties involved."

As stated above, 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".

PART 3 – SUPPORTING INFORMATION

BACKGROUND

In 2015, the Council adopted the Members' Planning Code & Protocol which was subsequently reviewed in 2018. The format of the Council's Code and 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 Code and Protocol forms Part 6 of the Constitution, relating to Codes and Protocols and is attached to the report as Appendix B.

Through the last review, of the content and principles of the Council's Members' Planning Protocol in 2021 it was considered that the District Council's document followed the Local Government Association (LGA) Probity in Planning guidance issued in 2019 therefore, only minor changes were made in the Site Visit provisions as a consequence of the COVID-19 pandemic.

Following a very difficult situation with members of the public at a site visit ahead of the meeting of the Planning Committee held on Thursday 22 September 2022 and at the request of the Monitoring Officer, the Constitution Review Working Party (CRWP), at its meeting held on 14 November 2022, had an initial discussion on the procedure for committee site visits as set out in section 7 of the Members' Planning Code and Protocol (February 2021). At that particular site visit the local Parish Council had encouraged public attendance to lobby the

Planning Committee members. During that initial discussion by the CRWP the following matters had been raised:-

- (1) What was the purpose of a site visit?
- (2) Whether every planning application going before the Planning Committee did, in fact, merit a pre-meeting Member site visit;
- (3) What was the definition of “lobbying”?
- (4) Whether the attendance of parish councils and/or the public at Planning Committee site visits should be allowed to continue;
- (5) The role of the Chairman in leading the Planning Committee’s site visits and whether such site visits should instead be led by a senior Planning Officer; and
- (6) Whether the Officer(s) in attendance should keep a record of the interaction between the Committee members and the public etc. at the site visits.

The CRWP subsequently, at its meeting held on 21 November 2022, was informed that a survey had been emailed to all Members of the Council to ascertain their views on this matter with a deadline for responses of 25 November 2022. In addition, Officers discussed the matter informally with members of the Planning Committee on 24 November 2022. The results of the survey were reported to the All Member Briefing in January 2023 and thence to the meeting of the CRWP held on 23 January 2023. At the invitation of former Chairman of the CRWP, Councillor White (former Chairman of the Planning Committee) attended that meeting and participated in the discussions on this matter. The CRWP AGREED that:

- (a) *“the CRWP supports that the Planning Committee continues its current practice of undertaking a site visit in respect of all planning applications that are submitted to it for its consideration;*
- (b) *the CRWP requests the Corporate Finance & Governance Portfolio Holder to recommend to Cabinet that the Monitoring Officer be requested to amend the Planning Committee’s Site Visit Procedure to appropriately reflect the following points:-*
 - (1) *including a definition of “lobbying”;*
 - (2) *strengthening the wording as to how the Chairman and Committee should proceed if faced at a site visit with (regardless of origin) persistent attempts at lobbying and/or persistent harassment and/or physical or verbal abuse;*
 - (3) *reflecting Members’ expectations that a Drone will be regularly available for the Planning Committee’s site visits and that such Drone will be employed, particularly in respect of the larger planning application sites;*
 - (4) *stating that the mandatory training for the members of the Planning Committee and its designated substitute members will include training in relation to undertaking site visits and acknowledging that this training will be offered to all members of the Council; and*
 - (5) *highlighting as a reminder to Members that Section 3.8 of the Members’ Code of Conduct states that Members are required to comply with the Council’s adopted rules and policies such as the Planning Code and Protocol for Member (which contains the Planning Committee’s procedure for Site Visits);*
- (c) *that the CRWP further requests Cabinet (via the Portfolio Holder) to request the Monitoring Officer to submit the Site Visit Procedure, as amended, to Full Council for its approval and adoption, following consultation, as appropriate and necessary, with the Planning Committee and the Standards Committee.”*

Cabinet, at its meeting held on 17 February 2023 decided, inter alia, that it:-

- (a) supports the proposal that the Planning Committee continues its current practice of undertaking a site visit in respect of all planning applications that are submitted to it for its consideration and requests Full Council to do likewise;
- (b) requests the Monitoring Officer to amend the Council's procedure for Planning Committee Site Visits, as set out in the Members' Planning Code and Protocol (in Part 6 of the Constitution) to appropriately reflect the matters raised by the Review of the Constitution Portfolio Holder Working Party; and
- (c) further requests the Monitoring Officer to submit the Site Visit Procedure, as amended, to Full Council for its approval and adoption, following consultation, as appropriate and necessary, with the Planning Committee and the Standards Committee.

PREVIOUS RELEVANT DECISIONS TAKEN BY COUNCIL/CABINET/COMMITTEE ETC.

These are set out and referred to within the body of the report.

BACKGROUND PAPERS AND PUBLISHED REFERENCE MATERIAL

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 – TDC's Members' Planning Code/Protocol

Appendix C – Planning Probity Protocol for the TCBGC Joint Committee

REPORT CONTACT OFFICER(S)

Include here the Name, Job Title and Email/Telephone details of the person(s) who wrote the report and who can answer questions on the content.

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