

Part 5A(1)

Members' Planning Code of Good Practice

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Part 5A (1) - Members' Planning Code of Good Practice

Background

This Code of Good Practice reflects changes introduced by the Localism Act 2011. It clarifies how councillors can get involved in planning in a fair, impartial and transparent way.

It has been based on a model originally produced by the Association of Council Secretaries and Solicitors (now Lawyers in Local Government) which was prepared in the light of the introduction of the new ethical framework and in consultation with the Local Government Association, the Local Government Ombudsman, and others.

Definitions of interests referred to in this Code are given in Part 5 of the Constitution; the Members' Code of Conduct.

Introduction

The aim of this Code of Good Practice: to ensure that in the planning process there are no grounds for suggesting that a decision has been biased, partial or not well founded in any way.

The key purpose of Planning: is to contribute to the achievement of sustainable development, not development at any cost. Planning ensures that the right development happens in the right place at the right time, benefitting communities and the economy. It plays a critical role in identifying what development is needed and where, what areas need to be protected or enhanced and in assessing whether proposed development is suitable. It does this by regulating the development and use of land in the public interest.

Your role as a Member of a Planning Authority: to make planning decisions openly, impartially, with sound judgement and for justifiable reasons.

When the Code of Good Practice applies: this Code applies to Members at all times when involving themselves in the planning process. This includes both decision making meetings of the Council when exercising the functions of the Planning Authority (usually at the Development Control and Regulatory Board for development management, referred to here as 'the Board' and at Cabinet and County Council for development plans) and involvement on less formal occasions, such as at meetings with officers or the public and at consultative meetings. It applies to planning applications, enforcement matters and policy issues (such as the Minerals and waste local plan).

If you have any doubts about the application of this Code to your own circumstances you should seek advice early from the Director of Law and

Governance as the County Council's Monitoring Officer or one of his or her staff, and preferably well before any meeting takes place.

1. Relationship to the Members' Code of Conduct

- **Do** apply the rules in the Members' Code of Conduct first. This must always be complied with.
- **Do** then apply the rules in this Planning Code of Good Practice, which seek to explain and supplement the Members' Code of Conduct for the purposes of your involvement in planning matters. If you do not abide by this Code of Good Practice, you may put:
 - the Council at risk of proceedings on the legality or maladministration of the related decision; and
 - yourself at risk of being in breach of the Members' Code of Conduct and if the failure is also likely to be a breach of the interest provisions of the Localism Act 2011, a complaint being made to the police to consider criminal proceedings.

2. Development Proposals and Interests under the Members' Code of Conduct

- **Do** disclose the existence and nature of your interest at any relevant meeting, including informal meetings or discussions with officers and other Members. Preferably, disclose your interest at the beginning of the meeting, or as soon as the interest becomes apparent, and not just at the commencement of discussion on that particular matter.
- **Do** then act accordingly. Where your interest is a **disclosable pecuniary interest** or a **personal interest that might lead to bias** you should declare the existence and the nature of the interest before it is considered, and
 - **don't** get involved in the processing of the application;
 - **don't** seek or accept any preferential treatment, or place yourself in a position that could lead the public to think you are receiving preferential treatment, because of your position as a Member. This would include using your position to discuss that proposal with officers or Members when other members of the public would not have the same opportunity to do so;
 - **do** be aware that, whilst you are not prevented from seeking to explain and justify a proposal in which you have a disclosable pecuniary interest or a personal interest that might lead to bias to an appropriate officer, in person or in writing, the Code places greater limitations on you in representing that proposal than would apply to a normal member of the public;

- **don't** participate, or give the appearance of trying to participate, in the making of any decision on the matter by the planning authority;
- **don't** try to represent local views, get another Member to do so instead;
- **do** be aware that where you have a disclosable pecuniary interest or a personal interest that might lead to bias you *may* attend a Board meeting to make representations, answer questions, or give evidence provided that public speaking rights also apply;
- **do** withdraw from any meeting prior to consideration of the matter, or if you have made representations as above, immediately after this, prior to any discussion on the matter (members of the public may remain in the meeting).
- **Do note the Principle of Honesty** “holders of public office have a duty to declare any private interests relating to their public duties and to take steps to resolve any conflicts arising in a way that protects the public interest”

3. Predetermination in the Planning Process

Predetermination is also referred to as ‘fettering discretion’. It is not the same as *predisposition*, as explained below.

As an elected Member involved in a planning matter:-

- **Don't** predetermine (fetter your discretion) by approaching the decision with a closed mind.
- **Do** be aware that in your role as an elected Member you are entitled, and are often expected, to have expressed views on planning issues (predisposition) and that these comments have an added measure of protection under the Localism Act 2011.
- **Do** keep at the front of your mind that, when you come to make the decision, you
 - are entitled to have and to have expressed your own views on the matter, provided you are prepared to reconsider your position in the light of all the evidence and arguments;
 - must keep an open mind and hear all of the evidence before you, both the officers' presentation of the facts and their advice as well as the arguments from all sides;
 - are not required to cast aside views on planning policy you held when seeking election or otherwise acting as a Member, in giving fair consideration to points raised;
 - are only entitled to take account material considerations and must disregard considerations that are irrelevant to the question and legal context at hand; and

- are to come to a decision after giving what you feel is the right weight to those material considerations.
- **Don't** participate in the determination of the matter at the Board if you do not have an open mind because if you did take part in the discussion or vote it would put the County Council at risk:

Firstly, it would probably constitute maladministration in the opinion of the Local Government Ombudsman.

Secondly, the Council could be at risk of a legal challenge, including Judicial Review, on a number of possible grounds:

- that there was a danger of bias on your part; or
- predetermination; or
- a failure to take into account all of the factors enabling the proposal to be considered on its merits.
- **Do** be aware that **predetermination** occurs when you are deemed to have made your mind up and will not consider any subsequent information presented.
- **Do** be aware that you can be **predisposed** by having an initial view of an application as to how you might decide a particular application, but you *must* keep an open mind at the meeting *and* make it clear that you are still willing to listen to all the material considerations presented before deciding how to exercise your vote.
- **Do** consider yourself able, for example, to:
 - make public statements on an issue, and
 - campaign on a particular issue;

provided you make it clear that you do not have a closed mind and are amenable to changing your mind in the light of all the information, advice and evidence presented to you at the time of making a decision.

- Where you have predetermined an application and you decline to speak or vote on a proposal:
 - **do** consider whether you should withdraw from the meeting during the Board's consideration of that application. Although you are not required to, you may prefer to leave to avoid any complaint that your presence may have influenced the decision;
 - **do**, if you decide to stay, explain that you do not intend to speak and vote because you have or you could reasonably be perceived as having predetermined the matter elsewhere, so that this may be recorded in the minutes.

County Council Proposals

- **Do** be aware that if you have been involved in the preparation, submission or advocacy of a planning proposal on behalf of the County Council (i.e. where it is the landowner, developer or applicant) you should avoid participating in the decision-making process as you could be considered to be biased or have predetermined the matter.

If you are a Local Member whose electoral division is directly affected by the application

- **Do** consider whether you should take the opportunity to exercise your separate speaking rights as a Local Member subject to the consent of the Chairman of the Board under Meeting Procedure Rule 34 where you have represented your views or those of local electors to such an extent that you have, or are likely to be seen as having predetermined the application. Where you do:
 - advise the proper officer or the Chairman that you wish to speak in this capacity before commencement of the item;
 - remove yourself from the member seating area for the duration of that item; and
 - ensure that your actions are recorded.

If you are a Member of another body involved in an application

- **Do** be aware that, although the provisions in the Members' Code of Conduct are applied in such a manner as to recognise that the Code should not obstruct a member's service on:
 - another local or public authority; or
 - a body to which you have been appointed or nominated by the Council as its representative;

you must decide in relation to any planning proposal, whether you have been involved to such an extent in the preparation, submission or advocacy of a planning proposal on behalf of such a body as to make your participation in the decision making process inappropriate. If you have then you should always disclose a personal interest that might lead to bias and withdraw from the meeting.

Participation in the discussions of consultee bodies by Members of the decision-making body

- **Do** consider yourself able to take part in the debate on a proposal when acting as part of a consultee body (i.e. where you are also a member of the district/borough council as well as being a County Member), provided that:
 - the proposal does not substantially affect the wellbeing or financial standing of the consultee body;
 - you make it clear during the discussion at the consultee body that:
 - (i) you will reserve judgement and the independence to make up your own mind on each separate proposal when it comes before the decision making body (e.g. the Board) and you hear all of the relevant information;
 - (ii) you will not in any way commit yourself as to how you or others may vote when the proposal comes before the Board for consideration; and
 - (iii) you disclose the personal interest regarding your membership of the consultee body or role when the Board comes to consider the proposal.

4. **Contact with Applicants, Developers and Members of the Public**

- **Do** refer an applicant, developer, or member of the public who approaches you about a planning application to Council Officers for planning, procedural or technical advice.
- **Don't** agree to any meeting with applicants, developers or groups of objectors/supporters where it can be avoided. Where you feel that a formal meeting would be useful in clarifying the issues, it is advisable that you do not seek to arrange that meeting yourself as this may be seen as your promoting one point of view or the other. Instead, you may request the Chief Executive (Head of Planning) to organise it. Officers 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 that the record of the meeting is disclosed when the application is considered by the Board.
- **Do** make it clear that you will only be in a position to make a final decision on the application after having heard all the relevant evidence and arguments at the Board.
- **Do** remember to:
 - follow the rules on lobbying (below);
 - consider whether it would be prudent in the circumstances to make notes when contacted and whenever an officer is not present; and
 - report to the Chief Executive any significant contact with the applicant or 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.

Presentations by Applicants/Developers

- **Do** feel able to attend public exhibitions or information events held by applicants/developers, but remember -
 - to ask questions only for the purposes of clarifying your understanding of the proposals;
 - that the presentation is not part of the formal process of debate and determination of any subsequent application; this will be carried out by the Board;
 - that a presentation can be a form of lobbying and you must not state how you or other members might vote.
- **Don't** attend private presentations from applicants/developers without requesting an officer to be present.

5. Lobbying

Special attention is needed with regard to lobbying in the planning decision making process. Lobbying in respect of other aspects of their work as a Member is commonplace and it is an accepted part of the democratic process. However, if such lobbying of members of the Development Control and Regulatory Board oversteps the mark (by reference to the examples below) it can lead to the impartiality and integrity of members being called into question and any decisions taken being referred to the Local Government Ombudsman and/or being subject to legal challenge.

This can be especially difficult for the Local ('patch') Member who is also a member of the Board. Therefore care is required when lobbying of and by a member occurs during consideration of a planning application.

A. Lobbying of Members

- **Do** remember that your overriding duty is to the whole community in Leicestershire, not just the people in your division. You need to make decisions impartially and ensure that you do not favour, or appear to favour, any person, company, group or locality.
- **Don't** declare the way you intend to vote.
- **Do** feel able to express an opinion on the merits prior to your formal consideration of the matter at the Board *but only* if you are very clear that you will only make your mind up at the meeting after hearing the officers'

presentation and evidence and arguments on both sides.

- **Do** explain to those attempting to lobby you that, whilst you can listen to what is said, you may be open to accusations of predetermination if you express a firm point of view or an intention to vote one way or another, and you would not then be able to participate in the Board's decision making.
- **Do** pass on any representations you receive and copy or pass on any lobbying correspondence you receive to the Chief Executive (Head of Planning) at the earliest opportunity.
- **Do** refer any offers made to you of planning gain or to restrict the development through a proposed section 106 planning obligation or otherwise to the Chief Executive (Head of Planning).
- **Don't** accept gifts or hospitality from any person involved in or affected by a planning proposal. If a degree of hospitality is entirely unavoidable, ensure it is of a minimum and its acceptance is registered in accordance with the Members' Code of Conduct.
- **Do** indicate that you will pass on that person's views to the Chief Executive and, if necessary, to the Board when it considers the matter, but that you cannot commit yourself to vote in any particular way. If you intend to speak at the Board in this way make it clear at the start of the meeting that this is what you are doing so that this can be recorded.
- **Do** remember that, unless you have a disclosable pecuniary interest or a personal interest that might lead to bias, you may:
 - Listen/receive viewpoints from residents or other interested parties;
 - Make comments to residents, interested parties, other members or appropriate officers, provided they do not consist of or amount to predetermining the issue and you make clear that you are keeping an open mind;
 - Seek information through appropriate channels; or
 - Be a vehicle for the expression of opinion or speak at the meeting as a Local Member, provided that, if you are also a member of the Board, you explain your actions at the start of the meeting/item and make it clear that, having expressed the opinion or local view, you will make up your own mind having heard all the facts and listened to the debate.

B. Lobbying by Members

- **Don't** lobby fellow members excessively regarding your concerns or views nor attempt to persuade them that they should decide how to vote in advance of a meeting of the Board. In this context:

Lobbying is: asking fellow members to hear or share one's thoughts and concerns on an issue.

Excessive lobbying is: applying such pressure on a fellow member that it amounts to an attempt to obtain a commitment as to how they will vote, whether spoken or unspoken. Pressure of this sort is an attempt to predetermine the outcome of the issue (making the decision potentially unlawful) and may also amount to the Member using their position improperly to confer an advantage or disadvantage (breaching paragraph 3.6 of the Members' Code of Conduct).

If you approach a fellow Member regarding a planning application:

- **Do** be mindful that they may feel under undue pressure more readily in the following situations:
 - a senior member lobbying a less senior colleague;
 - a number of members lobbying an individual;
 - persistent lobbying of a member.
- **Do** always be clear that your lobbying is to solicit interest only and is not to solicit a voting commitment.
- **Do** cease to lobby a member if it appears there is a risk that they will feel subject to pressure as to how he/she votes.
- **Don't** discuss how to vote on a planning proposal at a political group meeting or lobby other members to do so. The Local Government Ombudsman has made it clear that in his view the use of political whips to determine planning applications could amount to maladministration.

Membership of Lobby Groups

- **Don't** lead or act as spokesperson of an organisation whose *primary purpose* is to lobby or promote or oppose a planning application.
- **Do** feel able to join general interest groups which reflect your areas of interest and which concentrate on issues beyond particular planning applications, e.g. The Victorian Society, The Ramblers, CPRE, or a local civic society. However, if you are a member of such an organisation and this is relevant to a particular application, you should make sure that you declare a personal interest and consider whether this personal interest might lead to bias.

Undue or Excessive Lobbying

- **Do** inform the Director of Law and Governance if you feel you have been exposed to undue or excessive lobbying or approaches (including inappropriate offers of gifts or hospitality). The Director will ensure that the appropriate action is taken.

6. Site Visits

- **Do** attend site visits organised by the County Council.
- **Do** ensure that any information which you gained from the site visit is reported back to the Board, so that all members and officers have the same information.
- **Do** ensure that you treat the site visit only as an opportunity to seek information and to observe the site.
- **Do** ask the officers at the site visit questions or seek clarification from them on factual matters which are relevant to the site inspection.
- **Do** have regard to the Site Visit Protocol, in particular noting that all discussion during visits should be conducted through the Chairman and limited to the drawing of attention to facts/features associated with the site.
- **Don't** get involved in discussion with the applicant/developer or any members of the public who may be present during the visit; if you are approached advise them that representations should be made in writing, and direct them to or inform the County Council officer accompanying you.
- **Don't** express firm opinions or views or declare the way you intend to vote.
- **Don't** enter a site which is subject to a planning proposal other than as part of an official site visit, even in response to an invitation, as this may give the impression of bias unless:
 - you feel it is essential for you to visit the site other than through attending the official site visit;
 - you have first spoken to the Chief Executive (Head of Planning) about your intention to do so and why (which will be recorded on the planning file); and
 - you can ensure you will comply with these good practice rules on site visits.

7. Pre-Meetings

Briefing meetings for the Chairman and Spokesmen of the Board are held to facilitate the smooth running of the Board meetings. Discussion will be limited to procedural issues such as the organisation of site visits, arrangements for members of the public to exercise their speaking rights at the meeting, and to ensure that all the relevant paperwork and information is available for the meeting.

- **Do** use pre-meetings to resolve procedural issues to facilitate the smooth running of the formal meeting.
- **Don't** discuss the determination of applications at either briefing meetings or political group meetings.

- **Don't** ever use the political whip on a planning matter. This would leave the decision open to challenge and could give rise to a finding of maladministration by the Local Government Ombudsman.

8. Public Speaking at Meetings

The County Council has a procedure to allow members of the public to make representations at meetings of the Development Control and Regulatory Board. As an elected Member -

- **Do**, if contacted the public before the meeting, explain that whilst you may express a view you must be seen to be keeping an open mind on the matter, and that you will determine the application on its merits, having regard to material considerations.
- **Don't** allow members of the public to communicate with you at all during the Board's proceedings as this may give the appearance of bias.
- **Do** ensure that you comply with the Council's procedures in respect of public speaking.

9. County Council Officers

- **Don't** put pressure on officers to put forward a particular recommendation as this may be seen as prejudicing his/her professional integrity and impartiality. This does not prevent you from asking questions or submitting views to the Chief Executive which may be incorporated into any Board report.
- **Do** recognise that officers are part of a management structure and you should only discuss a development proposal, outside of any arranged meeting, with a Head of Service or those officers who are authorised by their Head of Service to deal with the proposal at a member level.
- **Do** recognise and respect that officers involved in the processing and determination of planning matters must act in accordance with any appropriate officer and professional codes of conduct, primarily the Royal Town Planning Institute's Code of Professional Conduct. As a result, planning officers' views, opinions and recommendations will be presented on the basis of their overriding obligation of professional independence, which may on occasion be at odds with the views, opinions or decisions of elected Members.

10. Decision Making

- **Do** come to Board meetings with an open mind and demonstrate that you are open-minded.

- **Do** make decisions in accordance with the relevant Development Plan unless material considerations indicate otherwise.
- **Do** come to your decision only after due consideration of all of the information reasonably required upon which to base a decision. If you feel there is insufficient time to digest new information or that there is simply insufficient information before you, request that further information. If necessary, defer or refuse the application.
- **Don't** vote or take part in the decision on a proposal unless you have been present to hear everything that has been said at that meeting, including the officers' introduction to the matter.
- **Do** make sure that if you are proposing, seconding or supporting a decision that you clearly identify and understand the planning reasons leading to this conclusion/decision. Where a decision is being taken contrary to officer recommendations, reasons must be given prior to the vote and these must be recorded. Be aware that you may have to justify the resulting decision by giving evidence in the event of any legal challenge.

11. Member Awareness

The planning system involves complex legal and technical issues which require the application of sound judgement in the assessment of planning proposals. A failure to follow proper practice and procedures can lead to serious consequences for the County Council as the Planning Authority.

The County Council has determined that all elected Members must attend a planning training session prior to being involved in the determination of planning decisions. You are strongly encouraged to participate in any further training on planning matters and this Code of Good Practice to assist you in carrying out your role properly and effectively.