

Cherwell District Council

Planning Committee

19 February 2015

**Public Speaking at Planning Committee and
Members' Planning Code of Conduct**

Report of Head of Law and Governance

This report is public

Purpose of report

To consider minor amendments to the procedure for requests by the public to address the Planning and to consider a proposed Members' Planning Code of Conduct to replace the current Good Practice Guidance on Planning Matters contained in Part 3 of the Constitution.

1.0 Recommendations

The meeting is recommended:

- 1.1 To recommend to Full Council the minor amendments to the procedure for requests by the public to address the Planning Committee (Appendices 1 and 2).
- 1.2 To recommend to Full Council that the Members' Planning Code of Conduct (Appendix 3) and Bias and Predetermination: A Guidance Note for Members (Appendix 4) be adopted.

2.0 Introduction

- 2.1 In 2009 the Council agreed to introduce public speaking at Planning Committee. The original procedure was reviewed and amended with the current public speaking procedure being implemented from May 2010. The scheme has proved largely successful and applicants, objectors and supporters have taken advantage of their right to address the Committee. Despite the success of the scheme, there are some minor points within the procedure rules which are a little unclear and minor amendments are proposed to provide clarification for elected members and members of the public.
- 2.2 The Members' Planning Code of Conduct has been produced to replace the current Good Practice Guidance on Planning Matters to reflect the changes to the Members'

Code of Conduct in 2012 and the current legal position on the subject of bias and predetermination. The proposed Code is based on a Model Code which was prepared by the former Association of Council Secretaries and Solicitors and supplements the Members' Code of Conduct. It has been drafted collectively by the monitoring officers in Oxfordshire and a similar version has been adopted or will be recommended for adoption by Oxfordshire County Council and City and District Councils elsewhere in the County.

3.0 Report Details

Public Speaking at Planning Committee

- 3.1 Appendix 1 sets out an annotated copy of the current procedure for Requests by the public to address the Planning Committee detailing the proposed minor amendments.
- 3.2 Appendix 2 sets out an annotated copy of the current text of the leaflet "How to have your say at planning meetings" detailing the proposed changes.
- 3.3 The proposed changes to the public speaking are minor and intended to provide clarification for elected members and members of the public and cover:
 - Speaking arrangements of applications that are deferred
 - Deleting the procedure for Planning Committee members with an interest in an application which is no longer applicable under the current Code of Conduct
 - Deletion of the restriction on allowing an individual to only speak once at a meeting on one application
 - The arrangements for registering to speak, which will no longer need to be a written request

Members' Planning Code of Conduct

- 3.4 The current Planning Matters – Good Practice Guidance for Members and Officers (Section 3.5 of the Council's Constitution) has not been reviewed since the implementation of the current Code of Conduct in October 2012 and therefore the two Codes are not wholly compatible.
- 3.5 The Oxfordshire Monitoring Officers' reviewed the Members' Planning Code of Conduct and agreed to submit the version attached at Appendix 3 (subject to minor amendments to reflect each authority) to their respective councils for consideration for adoption.
- 3.6 The proposed Members' Planning Code of Conduct is based on a Model Code which was prepared by the former Association of Council Secretaries and Solicitors, supplements the Members' Code of Conduct; and applies to Members at all times when involving themselves in the planning process, at less formal occasions such as meetings with officers or the public and at consultative meetings and to both planning application matters and to enforcement matters.
- 3.7 The proposed Cherwell District Council version of the Members' Planning Code of Conduct removes the existing allowance for elected members who are not trained

to participate in two Planning Committee meetings whilst the necessary training is undertaken. Given the importance of planning decisions being taken at all times by members on a fully informed basis it is considered necessary for all members to be trained before being able to participate in the determination of planning applications by the Committee. Steps will be taken to ensure that such training is made available to relevant members before the first Planning Committee meeting in each municipal year.

- 3.8 Appendix 4 sets out guidance for Members on bias and predetermination. This complements the Code of Conduct and proposed Members' Planning Code of Conduct and is proposed for adoption.

4.0 Conclusion and Reasons for Recommendations

- 4.1 It is good practice for review procedures to ensure they are up-to-date, fit for purpose and reflect current legislation.
- 4.2 The minor amendments to the Planning Committee Public Speaking Procedure ensure that the procedure is clear for elected members and members of the public.
- 4.3 The Members' Planning Code of Conduct reflects and supports the current Code of Conduct. It provides clear guidance for all elected members when undertaking the Council's duties as the local planning authority.

5.0 Consultation

None

6.0 Alternative Options and Reasons for Rejection

- 5.1 The following alternative options have been identified and rejected for the reasons as set out below.

Option 1: To reject the recommendations.

Option 2: To amend the proposed minor amendments to the Public Speaking at Planning Committee and Members' Planning Code of Conduct

7.0 Implications

Financial and Resource Implications

- 7.1 There are no financial implications arising directly from this report.

Comments checked by:

Nicola Jackson, Corporate Finance Manager, 01295 221731
nicola.jackson@cherwellandsouthnorthants.gov.uk

Legal Implications

- 7.2 It is important the public speaking procedure rules for planning committee are clear and easy to understand and that the Members' Planning Code of Conduct reflects the Code of Conduct and the current legal position on relevant matters. The proposed Code achieves this.

Comments checked by:

Kevin Lane, Head of Law and Governance, 0300 003 0107,
kevin.lane@cherwellandsouthnorthants.gov.uk

8.0 Decision Information

Wards Affected

All

Links to Corporate Plan and Policy Framework

N/A

Lead Councillor

N/A

Document Information

Appendix No	Title
1	Annotated extract of the Constitution: Section 2.6, Planning Committee Procedure Rules
2	Annotated "How to have your say at planning meetings" leaflet text
3	Members' Planning Code of Conduct
4	Bias and Predetermination: A guidance note for members
Background Papers	
None	
Report Author	Natasha Clark, Democratic and Elections Team Leader
Contact Information	01295 221589 natasha.clark@cherwellandsouthnorthants.gov.uk

Extract from the Constitution: Section 2.6, Planning Committee Procedure Rules

Requests by the Public to Address the Planning Committee

1. Members of the public, including the applicant (or their representative), representatives from the relevant Town or Parish Council, local interest groups and local civic societies, may address Planning Committee during consideration of any application for planning permission
2. The following groups may address the meeting for up to five minutes each:
 - Objectors
 - Applicant and/or Supporters

Where more than one person has registered to speak in any of the above groups of speakers, the five minute period shall be shared. In ~~these such~~ circumstances, Objectors are encouraged to appoint a spokesperson. If no spokesperson is nominated, Objectors will be heard in the order in which they have registered until the five minute period has elapsed. The Applicant (or their agent) will speak first in their five minute period followed by any other supporters until the five minute period has elapsed.

3. ~~The deadline to register to An application to speak at Planning Committee is midday on the last working day before the committee meeting. Requests must be made received in writing or by electronic mail to by Democratic and Elections Services by midday on the last working day before the committee meeting.~~

Applications to speak at Planning Committee will only be accepted by persons who have made written representations on an application as part of the consultation process or the applicant or the applicant's agent.

Persons who have registered to speak may appoint someone to speak on their behalf provided that ~~written authority from~~ the person who has registered to speak ~~notifies is given to~~ Democratic ~~and Elections Services~~ before the Planning Committee commences.

4. ~~Persons registering to speak must provide Applications to speak must include the name of the person wishing to speak, register and a contact telephone number, the application they wish to speak on, whether they will be speaking in support or objection to the application and the capacity in which they are registering. Persons registering to speak Applicants~~ should also confirm if they are willing for the Council to share their contact details with other speakers so that arrangements can be made to nominate a spokesperson if necessary.
5. When there is a linked or duplicate application each speaker can only speak on one application site, regardless of the number of applications for that site.

For example, in the case of linked applications for planning permission and listed building consent on the same property, speakers may only speak once.

6. Public speaking at Planning Committee is only permitted on planning applications, not any other report submitted to the Committee.
7. When planning applications are referred to full Council ~~by Councillors~~ the normal Council public speaking rules apply, as set out in the Council procedure rules.

Procedure

8. Any requests to speak received after midday on the last working day before the committee meeting will not be accepted.
9. ~~Members of the public who have registered to speak must sign a declaration of conduct at Planning Committee. Members of the public who do not sign the declaration will not be permitted to address the Committee.~~
10. Before the planning application report is considered in detail, the Committee may agree to defer ~~that~~ the application ~~be deferred~~ for a site visit or to obtain further information. In such cases, there will be no public participation on the application until it is reconsidered at a future meeting. Persons who have registered to speak on applications that are deferred to a future Planning Committee meeting are not required to register again.
11. The Planning Officer will present the application to the Committee and inform Members of any late representations or updates.
12. Ward Members and any Members of the Committee with a significant prejudicial interest (excluding disclosable pecuniary interest in which case the member must leave the meeting for the duration of the item) will then be entitled to speak on the application. ~~After making their presentation Ward Members may, at the discretion of the Chairman, answer questions and sum up their view at the end of the debate. They then must return to the public gallery. Members of the Committee with a prejudicial interest must leave the room for the debate and vote.~~
13. The persons who have registered to speak will ~~then~~ be introduced by the Chairman in order of Objectors and Supporters, with the applicant always speaking first is their allotted time. Once a speaker has made their statement there will be no further right to address the meeting and at the speaker must return to the public gallery.
13. The Planning Officer will ~~then~~ clarify any planning points made by speakers relevant to the application.
14. The Committee will debate the application and make a decision on the application. Should the Committee choose to defer the application for a site

visit or further information after the public speaking part of the item has passed, when the application is brought back to Committee, no public speaking will be permitted unless there are significant material changes to the application in the meantime. This will be at the discretion of the Chairman.

15. Members of the public, Ward Members and Committee Members may not show plans, drawings, video clips, photographs or circulate written material.
16. The Chairman of the meeting may:
 - (a) vary the order of representation if he/she considers that it is convenient and conducive to the despatch of the business and will not cause prejudice to the parties concerned, or
 - (b) remove any person from the meeting if they behave in a disorderly manner.

How to have your say at planning meetings

Members of the public have the right to speak at Cherwell District Council planning meetings. This leaflet explains how.

The Planning Committee considers certain applications for planning permission. Members of the public may request to speak on applications considered at a meeting of the planning committee if they have made written representations on an application.

This gives you an opportunity to give your views in person to the committee. The committee will continue to take account of letters of support or objection.

The opportunity to speak is available to applicants or their agents, objectors, local residents, town/parish council representatives and any other person with an interest in a certain application, providing they have made written representations on an application. Public speaking only applies to applications which are considered put forward to by the committee, not applications that are determined by Planning Officers.

When and where does the planning committee meet?

All committee meetings are held in the Council Chamber at Cherwell District Council Offices, Bodicote House, Bodicote OX15 4AA.

The planning committee meets every 4 weeks at 4pm on a Thursday. a full calendar of meetings can be found on our website: www.cherwell.gov.uk. ~~you can also watch a meeting as they~~ are web cast live on the internet and available to view for 6 months after the meeting date.

Who can speak?

Applicants (people applying for planning permission) or their agents, parish/town council representatives and any person or group who has made written representations on the application.

Which planning applications can I speak on?

Any planning application for determination that you have applied for, or made a written representation on, as part of the planning consultation process. You cannot speak on legal or enforcement action when the committee is considering whether to take legal action or monitoring reports.

When will the application be considered?

Applications will usually be considered in the order in which they appear on the agenda of the meeting.

The Chairman has the discretion to change the order agenda items are considered in. If your application is a later item on the agenda, please be aware it may be considered earlier.

~~However, the~~ An application may be ~~deferred~~ laid until another meeting if further information, negotiations or a site visit is needed. If an application is deferred, public speakers are not required to register again if they have not spoken. However, if public speakers have already addressed the Committee, no further public speaking will be permitted unless there are significant material changes to the application in the meantime. This will be at the discretion of the Chairman of the Committee. If this happens then public speakers are not required to register again.

What is the procedure for speaking?

~~The~~ One of the planning officers will present the application referring to the report in the published agenda. The report will include a planning officer's recommendation as to whether it should be approved or refused.

Following the presentation by the planning officer, 's report the local Ward Member (if not a member of and any members of the Committee) and any members of the Committee with a significant who have a prejudicial interest (unless a disclosable pecuniary interest in which case the member must leave the meeting for the duration of the item) will have the opportunity to speak.

The following groups of speakers will be introduced and invited to speak by the Chairman of the meeting:

People who have registered to speak will be introduced by the Chairman in order of objectors and applicant or agent/supporters. The applicant will speak first in their 5 minute period.

The planning officer will then clarify any planning points in the speakers' statement, relevant to the planning application. The Committee will debate the application and make a decision on the application. If the committee approve it they may also vote to impose certain conditions on the application.

~~You will only have one opportunity to speak at the meeting, on any one application.~~

How long will I be able to speak?

Applicants will be grouped into applicant/supporters and objectors. Each group can speak for up to 5 minutes. If more than one person has registered to speak in each group the 5 minutes will be shared. In such those circumstances speakers are encouraged to nominate a spokesperson. If no spokesperson is nominated speakers will be heard in the order in which they have registered to speak, on a strictly "first come, first served" basis until the 5 minutes has elapsed. This does not apply to the applicant/supporter group where the applicant or their agent takes precedence in the 5 minute speaking slot.

There is no time limit for the local Ward Member, although this should be within reason and is at the discretion of the Chairman.

How can I best use my time when speaking to the committee?

This will depend on the planning application but please try to limit your views to relevant planning issues. The committee take these types of issues into account when making their decisions:

- Whether the site is suitable for development
- Design, appearance and layout
- Over-looking and over-dominance
- Highway safety and traffic
- Noise, disturbance and smell
- National and Local planning policy and guidance.

The Committee must ignore non-material considerations when making their decision.

Can I bring handouts to distribute to the Committee?

No. Members of the public, Ward Members and Planning Committee members may not show plans, drawings, photographs, video clips or circulate written material, as this opportunity has already been given as part of the planning consultation process.

~~Which planning applications can I speak on?~~

~~Any planning application for determination that you have applied for, or made a written representation on, as part of the planning consultation process. You cannot speak on legal or enforcement action when the committee is considering whether to take legal action.~~

How do I arrange to speak at a meeting?

Requests to address the Planning Committee on a particular application will not be accepted until it has been included on a published agenda.

If you want to speak on an application you will need to contact Democratic ~~and Elections Services in writing by post or email~~ no later than 12 noon on the last working day before the meeting. You must provide ~~indicate the application you wish to speak about,~~ your name and email address or telephone number, the application you wish to speak about, ~~-You must indicate~~ whether you are an objector or supporter and the capacity in whichh you will be speaking. You will be asked ~~Please indicate~~ if you are willing to share your contact details with other speakers so that arrangements can be made to nominate a spokesperson.

~~Letters should be addressed to
Democratic Services,
Bodicote House,
Bodicote Banbury
OX15 4AA~~

~~and e~~Emails: -sent to
democracy@cherwell~~andsouthnorthants-de~~.gov.uk

Phone: 01295 221534

~~On the last working day before the Committee meeting when the deadline to register has passed Democratic Services will confirm if you are eligible to address the committee and will circulate contact details where appropriate. any~~Any requests to speak received after midday on the last working day before the Committee meeting will not be accepted.

How to contact us

Democratic Services
Cherwell District Council
Bodicote House
Bodicote
Banbury
Oxfordshire
OX15 4AA

Tel: 01295 2215~~3491~~
Email: democracy@cherwell~~andsouthnorthants-de~~.gov.uk

Call 01295 2215~~3491~~
or visit www.cherwell.gov.uk

3.5 Members' Planning Code Of Conduct

If you have any doubts about the application of this code to your own circumstances you should seek advice, preferably well before any meeting takes place.

About This Code:

This code:

- is based on a Model Code which was prepared by the former Association of Council Secretaries and Solicitors;
- supplements the Members' Code of Conduct; and
- applies to:
 - o Members **at all times** when involving themselves in the planning process
 - o at less formal occasions such as meetings with officers or the public and at consultative meetings
 - o both planning application matters and to enforcement matters.

The Planning System – The Members' Role

The key purpose of the planning system is to manage development in the public interest. The Members' role is to make planning decisions

- openly and transparently
- impartially
- for justifiable planning reasons.

This Code aims to ensure that all decisions are made in accordance with these principles.

Key Points (Golden Rules)

Planning decisions involve a balance between private and public interests where opposing views are often strongly held.

Your overriding duty is to the whole community not just to the people in your ward.

Decisions must not only **be** impartial they must be **seen to be** impartial. You should not favour, or appear to favour, any person, company, group or locality. You should not give the appearance of pre-judging ("pre-determining") the matter before it is considered by the Committee.

Planning decisions must be made in accordance with the statutory development plan unless material planning considerations indicate otherwise.¹

The views of officers involved in the determination of planning matters will be presented on the basis of their overriding obligation of professional independence.

You may think that material planning considerations outweigh the development plan, or take a different view of the planning balance than is contained in the officer recommendations. You are fully entitled to do so but you will need to make sure that you can clearly identify and support the planning reasons leading to this conclusion/decision. Advice should still be sought from Planning Officers in relation to setting out the rationale for your decision.

Essential – Do's and Don'ts

Disclosable Pecuniary Interests

DO, as soon as you become aware that you have a disclosable pecuniary interest in any matter to be discussed at a meeting, make a verbal disclosure of that interest.

DO leave the meeting before that matter is discussed or, if you realise after the discussion has begun, as soon as you have made your disclosure.

DON'T participate in the discussion or vote on a matter in which you have a disclosable pecuniary interest unless you have been granted a dispensation.

DO notify the Monitoring Officer of your disclosable pecuniary interest in writing within 28 days of your disclosure unless it is already included on your register of interests form published on the Council's web site.

DO seek advice from the Monitoring Officer if you are in any doubt about what to do.

Where you have a Disclosable Pecuniary Interest

DON'T get involved in the processing of the application.

DON'T attend any formal or informal meeting about the application or seek to speak at meetings.

DON'T try to represent local views.

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 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 councillor. This would include, where you have a disclosable pecuniary

¹

Section 38(6) Planning & Compulsory Purchase Act 2004

interest in a proposal, 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 to an appropriate officer (in person or in writing), the Code places greater expectations as to conduct than would be imposed on a normal member of the public.

Your Own Proposals

DO notify the Monitoring Officer, in writing, of your own proposals and those where you act as agent for a third party - this notification should be made no later than the submission of the application. These proposals will be reported to the Committee as main items and not dealt with by officers under delegated powers.

Where you have no Disclosable Pecuniary Interest

You may take part in the decision making process but need to take account of the following points:-

Do keep at the front of your mind that, when you come to make a 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 realised;
- are only entitled to take into account a material consideration and must disregard considerations 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

Bias and predetermination – don't fetter your discretion²

DON'T fetter your discretion by approaching the decision with a closed mind. Doing so will prevent you from participating impartially in planning decisions: making up your mind ("**pre-determination**"), or even appearing to make up your mind in advance of the Committee meeting, and of your hearing the arguments on both sides, may put the Council at risk of legal proceedings.

² Members should also have regard to the Council's more detailed guidance: ***Bias and Predetermination: A guidance note for members***

Remember:

- Planning decisions should only be taken with knowledge of all the relevant considerations, including responses to consultations where relevant. The officers' reports are intended to bring together all relevant considerations, and further matters may arise at the committee meeting. It is therefore not possible to come to a firm decision in advance of the meeting. You may have a view as to how you will decide a particular matter ("**pre-disposition**") but you must keep an open mind at the meeting.

Where you have Fettered your Discretion

- Don't speak and vote on the proposal at the meeting;
- Although you are not required to withdraw from the meeting, you may prefer to do so to avoid any complaint that your presence influenced the decision.

You can still exercise your separate rights as Local Ward Member where you have fettered your discretion. If you do exercise that right:

- advise the Proper Officer or Chairman that you wish to speak in this capacity before commencement of the item; and
- remove yourself from the room for the duration of that item.

District Council Proposals

DO be aware that you are likely to have fettered your discretion where the Council is the landowner, developer or applicant and you have acted as, or could be perceived as being, a chief advocate for the proposal. (This is more than just a matter of membership of both the proposing and planning determination committees, but that through your significant personal involvement in preparing or advocating the proposal you will be, or perceived by the public as being, no longer able to act impartially or to determine the proposal purely on its planning merits). The best advice in these circumstances is not to take part in the decision or vote on the proposals.

Participation in the Discussions of Consultee Bodies

Members may have a dual role as both members of organisations that are consulted on planning proposals and as members of the Planning Committee. In those circumstances:-

You may take part in discussions of the consultee body on the proposal **IF** you make it clear to the consultee body that:

- your views are expressed on the limited information before you only, **AND**
- you must reserve judgement and the independence to make up your own mind on the proposal based on your overriding duty to the whole community and not just to the constituents of that body, **AND**

- you will not commit yourself as to how you or others may vote when the proposal comes before the Planning Committee.

How to Deal with Lobbying

DO remember that your overriding duty is to the whole community not just to the people in your Ward. You need to make decisions impartially. Make sure that you do not favour, or appear to favour, any person, company, group or locality.

DON'T declare the way you intend to vote

DON'T express any opinion on the merits prior to your formal consideration of the matter at a meeting(s) of the planning authority unless you make it very clear that you will only make up your mind at the meeting after hearing the officers' presentation and evidence and arguments on both sides.

DO explain to those lobbying or attempting to lobby you that, whilst you can listen to what is said, it prejudices your impartiality to express a firm point of view or an intention to vote one way or another.

Unless you have a Disclosable Pecuniary Interest, 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 pre-determining the issue and you make clear 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 a member of the Committee, 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.

Dealing with Particular Groups

Applicants/Developers

DO refer applicants/developers who approach you for planning or procedural advice to officers wherever practicable.

DON'T agree to a meeting with applicants or developers where you can avoid it, except where this is part of a meeting organised by an officer and at which an officer is present. (Councillors do not normally take part in officers' discussions with applicants before a decision is taken, unless there are clear guidelines published by the Council to protect and assist councillors and officers. Where you do become

involved, you should be advised by the appropriate officers and the discussions should be recorded as a written file note.)

DO ensure that you report to the Head of Development Management any significant contact with the applicant and other parties and explain the nature and purpose of the contacts and your involvement in them. Ensure that this is recorded on the planning file.

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 Committee.

DO consider whether it would be prudent to make notes of what is said if no officer is present.

- ***Lobby Groups***

DON'T become a member of, lead or represent a lobby group seeking to promote or oppose planning proposals. If you do and you are a member of the Committee, you will have fettered your discretion.

- ***Political Groups***

DON'T decide how to vote at any sort of political group meeting, or press any other Member to do so, in advance of the meeting at which any planning decision is to be taken.

- ***Presentations***

DON'T attend presentations unless they have been organised by officers and an officer is present.

DO ask relevant questions for the purposes of clarifying your understanding of the proposals.

DO remember 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 appropriate Committee of the planning authority.

DO be aware that a presentation is a form of lobbying and you must not express any strong view or state how you or other Members might vote.

- ***Undue or Excessive Lobbying***

DO inform the Monitoring Officer where you feel you have been exposed to undue or excessive lobbying or approaches (including inappropriate offers of gifts or hospitality). The Monitoring Officer will in turn advise the appropriate officers to follow the matter up.

Gifts and Hospitality

Be careful about accepting gifts or hospitality wherever possible. If some hospitality is unavoidable, ensure that it is not excessive or inappropriate. Whilst not a disclosable pecuniary interest, a member, nevertheless, has the option of registering this so as to demonstrate openness and transparency to avoid any allegation of corruption or impropriety.

Dealings with Officers

DON'T put pressure on officers to put forward a particular recommendation. (This does not prevent you from asking questions or submitting views on the proposal, which may be incorporated into any committee report.)

DO recognise that officers are part of a management structure and only discuss a proposal, except in any formal 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 the Council's Code of Conduct for Officers and their 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 the Committee or its Members.

Site Visits

DO ensure that you treat the site inspection only as an opportunity to seek information and to observe the site.

DON'T express opinions or views to anyone.

DO try to attend site visits organised by the Council where possible.

DO ask questions or seek clarification of matters that are relevant to the site inspection.

DON'T hear representations from the applicant or third parties.

DON'T visit a site on your own, even in response to an invitation, as this may give the impression of bias. Exceptionally, where there is no organised site visit, and with the prior approval of the Head of Development Management, the local ward member or in appropriate circumstances other members, may ask for an individual site visit accompanied by an officer (there is nothing preventing you from viewing a particular site from the public highway).

Communication with the Public at Committee Meetings

DON'T allow members of the public to communicate with you (orally or in writing) during the Committee's proceedings, as this may give the appearance of bias.

Making Decisions

DO comply with section 38(6) of the Planning and Compulsory Purchase Act 2004 and make decisions in accordance with the Development Plan unless material considerations indicate otherwise.

DO come to your decision only after due consideration of all of the information reasonably required to base a decision upon. If you feel there is insufficient time to digest new information or that there is simply insufficient information before you, request it. If necessary, defer or refuse.

DON'T vote or take part in the meeting's discussion on a proposal unless you have been present to hear the entire debate, including the officers' introduction to the matter.

DO ensure that, if you request a proposal to go before the Committee rather than be determined through officer delegation, your reasons are recorded and repeated in the report to the Committee.

DO have recorded the reasons for any Committee decision to defer a proposal.

Where the Officers' Recommendation is not Accepted

Decisions on planning matters (unless delegated to officers) are ultimately for members to make. But decisions, whoever makes them, must be made in accordance with the development plan unless material considerations indicate otherwise³.

If the officers' recommendation is not to be followed, equally robust planning reasons for the decision must be given at the meeting and minuted. Those reasons must be capable of being defended at any subsequent appeal.

Officer reports will include a recommendation based on an assessment of the proposal against the development plan and material considerations, including those arising from the representations made by the applicant and consultees. The reasons for the recommendation will be set out in the report. If members take a different view at the meeting, they will need to provide equally argued planning reasons. If on reading the officers' report, you form an initial impression that leads you to be pre-disposed to go against the recommendation, it may help to discuss tentative reasons with officers before the meeting.

DO make sure that if you are proposing, seconding or supporting a decision contrary to officer recommendations or the development plan that you clearly identify and understand the **planning reasons** leading to this conclusion/decision. These reasons must be given prior to the vote and be recorded. Be aware that you may have to justify the resulting decision by giving evidence in the event of any challenge.

Procedure if Officers' Advice is not to be Followed:

Proposer to set out planning reasons for the proposal.

³

Section 38(6) Planning & Compulsory Purchase Act 2004

Officers to be given time to comment on those reasons and their ability to withstand challenge through the appeal procedures.

Chairman may adjourn briefly for proposer and seconder to discuss and formulate reasons with officers, reconvening for a vote and for reasons to be fully recorded. If Chairman concludes that there are opposing views amongst Committee members he may take a vote on the proposal without adjourning for discussion with officers. In such circumstances the planning reasons for the proposal should be set out in detail before the vote is taken.

Training

DON'T participate in decision making at meetings dealing with planning matters if you have not attended any mandatory planning training prescribed by the Council.

DO try to attend any other specialised training sessions provided. These will be designed to extend your knowledge of planning law, regulations, procedures, Codes of Practice and the Development Plans beyond the minimum referred to above and thus assist you in carrying out your role properly and effectively.

In accordance with Government guidance, it is Council policy that every Member of the Council must receive formal training in the planning system before serving on the Planning Committee. Similarly, any present or newly elected Member participating in the determination of a planning application by full Council, must receive such training before taking part.

If training is declined or not undertaken for any reason, then the Member concerned would not be able to participate in Planning Committee meetings or at meetings of full Council when it is determining a planning application.

Sanctions

Sanctions (including offences)

If you do not follow this code, you may put:

- The Council at risk of proceedings on legality or of maladministration;
- Yourself at risk of breaching the Members' Code of Conduct.

It is a criminal offence (without reasonable excuse), if you are aware that you have a disclosable pecuniary interest in a matter being considered at a meeting:

- Not to disclose that interest (unless it is already registered)
- To participate in any discussion or vote on that matter.

External Sanctions

These include:

Local Government Ombudsman

The Ombudsman can investigate the process by which a planning decision has been taken (though not the decision itself). If injustice caused by maladministration is

found, the report may name the Member involved and give particulars of the breach. The report may be made publicly available.

Appeals to the Secretary of State

If an appeal is lodged and the Council is found to have been unreasonable (for example by making a decision for inadequate planning reasons) the appellant's costs may be awarded against the Council.

Judicial Review

If the Council can be shown to have not followed the correct procedures in determining an application or to have taken into account irrelevant considerations, the court may quash the decision. The claimant's costs would normally be awarded against the Council.

Bias and Predetermination

A Guidance Note for Members

Introduction

- 1) Local Authorities are legal entities that are required to make decisions in accordance with the law and in accordance with their own governance arrangements as set out in a Constitution and a Code of Conduct. Each Principal Authority must appoint a Monitoring Officer who has responsibility to ensure lawful decision making. The Monitoring Officer is required to report to the Authority where the actions of the Council itself, its Committees or Sub-Committees, Councillors or employees give rise or is likely to give rise to a breach of any legal enactment or maladministration (Section 5 of the Local Government and Housing Act 1989).

Lawful Decision Making

- 2) There are certain procedural requirements in relation to the membership and operation of decision making meetings and legal requirements as to the provision of sufficient information to enable informed decisions to be made. There can also be legal requirements to undertake consultation before decisions are made. Where consultation is required (or whenever it is undertaken) it must be done properly and the results taken into account by the decision maker, before a final decision is made.
- 3) It is essential that the public have confidence in the procedures adopted and that Members themselves ensure that decisions are properly taken in accordance with legal requirements.
- 4) Legal challenges are common, particularly on controversial matters, and the limits of judicial review mean that whilst claimants will often be aggrieved with the merits of a decision it is more often the case that challenges are brought on the basis of alleged defects in the decision making process.
- 5) The key components to lawful decision making are that Members do not close their minds to permissible outcomes, consider issues in good faith without the presence or appearance of bias, have regard to all relevant considerations and act in accordance with the law.

What is Predetermination or Bias?

- 6) Predetermination is where a Councillor's mind is closed to the merits of any other arguments about a particular issue on which they are making a decision and that they have already made their minds up about it. The Councillor makes a decision on the issue without taking all relevant information into account.

- 7) Predetermination is therefore the surrender by the decision-maker of his/her judgement by having an evidentially closed-mind such that they are unable to apply their judgement fully and properly to an issue requiring decision.
- 8) It is essential that Councillors do not appear to have already made up their minds in advance of the meeting itself. Such impressions can be created in a number of different ways such as quotes given in the Press or what is said at the meeting itself or at other meetings and in correspondence (particularly, nowadays, in e mails) Predetermination may amount to a form of bias.
- 9) Bias can also occur where the private interests of a Councillor impact or may be perceived to impact on their decision making. For example, where the Councillor's relationship with any person or body/agency who may be affected by the decision may reasonably be perceived to affect, their ability to weigh matters fairly and properly. Bias is conduct that, to a fair-minded and informed observer, gives rise to a real possibility that a member is biased in the sense of approaching a decision with a closed mind and without impartial consideration of all the issues. Bias is technically of two sorts: actual bias and apparent bias. The latter is easier to allege and establish. The test is whether a reasonable, informed observer would take the view that there was a possibility of bias¹. If a Member participated in a decision despite having a pecuniary interest then that would be actual bias. Giving the appearance of having a closed mind on an issue may lead to an allegation of apparent bias.
- 10) In instances of both predetermination and bias, the implication is that a decision will be taken in a particular and fixed way irrespective of the merits or the information provided at the meeting.

Consequences

- 11) Where a Councillor has a closed mind, this potentially has a direct impact on the validity of the decision and might make the decision challengeable either by way of Judicial Review or some other legal appeal process. If proven it would amount to a procedural irregularity and might mean that the decision taken by the Committee is then regarded as unlawful and void.
- 12) Challenges can also be made via a complaint to the Local Government Ombudsman who can investigate the matter and has power both to secure documentation held by the council and to require witnesses to attend for interview. A finding of maladministration requires the Council to place a public notice of the findings, debate at full Council and respond to the findings.
- 13) The Monitoring Officer also has the power to investigate a matter and decide if there has been any procedural irregularity as well as a possible breach of the member's code of conduct.

Predisposition

¹ R (on the application of Ortona) v SSCLG 2009 JPL 1033. See *Georgiou v LB Enfield* (2004) EW HC 779.

- 14) Predisposition means that a person has not yet fully made up their mind about an issue. Although they may have policy, personal or other legitimate reasons to be disposed toward a particular outcome, predisposition still holds open the possibility that the member will have regard to all of the evidence provided to him or her and is still open to persuasion on the facts of the case.
- 15) The law recognises that a Councillor may be predisposed to a particular view on issues but this in itself is not a bar from them taking a full part in the decision making. Provided they have an open mind to the merits of the arguments before they make a final decision on the specific issue before them e.g. a general antipathy to wind farms does not preclude a specific decision about a specific application for a wind turbine planning application in a specific locality. The general view does not close the member's mind to the relevant facts concerning the specific decision that needs to be taken.
- 16) By the nature of the councillor role, elected members will have predispositions on matters of policy, or perhaps on a local issue for which they have campaigned or stood for election. The holding and expression of views, even strong views, is to be expected. The common law recognises this and has established that only if a councillor firmly closes his/her mind to any other possibility (when called upon to take or participate in a decision) will the courts judge the matter as having strayed into predetermination or bias.
- 17) The law recognises that Councillors do have opinions and views on a wide range of issues and whilst not having a closed mind, nevertheless, they are not expected to have an empty mind!**

Localism Act 2011

- 18) In order to make it explicitly clear that all Councillors should be entitled to speak on behalf of their communities without necessarily precluding themselves from local decision making, Section 25 of the Localism Act 2011 was implemented to address this issue. In effect, expressions of a view on a particular local planning issue, or campaigning for election on a particular platform, should not of itself be treated as evidence of a closed mind on a particular matter which would prevent them from participating in Council business relating to that issue.
- 19) Section 25 states that if there is an issue about the validity of a decision as a result of an allegation of bias or predetermination (either actual or apparent) then in those circumstances a decision maker is not to be taken to have had or to appear to have had a closed mind just because he or she has previously done anything that directly or indirectly indicated what view they might take or would take in relation to the matter.
- 20) The clear intention of the legislation is to allow Members to feel more confident in becoming involved in local debate without fear of precluding themselves from taking part in decision making.
- 21) This is based on the principle that a member should be deemed to be open to persuasion on the facts of the case before the actual decision is taken at the

Committee, having taken into account the relevant Committee reports, the debate, advice provided, consultation undertaken and any representations made at the meeting i.e. taking into account all of this information and only then making a decision.

- 22) However, this Section does not provide blanket protection or immunity for anything that is said by a Member. The test of what an 'impartial and fair minded observer would think'² would still apply in relation to interests or relationships, which bring into question issues of undue influence or bias. The protection of Section 25 only relates to previous statements not being **in of themselves** proving predetermination or bias. If there is other evidence available to demonstrate predetermination or bias then such statements might then become admissible.

Freedom of Speech

- 23) There is an important difference between those Councillors who are directly involved in making a decision and those Councillors who are legitimately seeking to influence that decision. Councillors who are not involved in making a decision are generally free to speak how they want with regards to a matter and indeed frequently take on the role of advocate for the local community. This can include attending a decision making Committee as a non-Committee member and, with the leave of the Chairman addressing the Committee on the merits of the matter before it.

Case Law

- 24) The Localism Act effectively confirms and re-states the established case law in relation to predetermination and it is therefore helpful to consider such cases as they provide practical examples of instances where predetermination was not proven.

R (Lewis) v Redcar and Cleveland Borough Council [2010] UKSC11

- 25) A highly controversial decision taken just before an election was unsuccessfully challenged. Members were entitled to be predisposed to determine an application in accordance with their own political views and policies, provided that they listened to the arguments and had regard to all material considerations. Neither the proximity of the local election nor the unanimity of the members of the majority group in themselves were capable of demonstrating that those who voted in favour of the application had closed minds to the planning merits of the proposal.

R (Island Farm Development Limited) v Bridgend CBC 2006 EWHC 2189

- 26) This case involved a refusal by a Local Authority to sell land to the claimant who wished to develop it. There were strong local feelings about the matter and indeed several members of the Council had been elected having campaigned

² Porter v Magill 2001 VKHL 67

against the sale. The Judge held that Members were entitled, when making decisions on local issues, to take into account policies they believe in, especially if they have been part of a manifesto in a local election. Prior statements were simply evidence of predisposition, not of closed minds.

Condron v National Assembly for Wales [2006] EWCA Civ 1573

27) In the case of Condron, a Member as he walked into the building just prior to the meeting, was asked how he was going to vote and stated that he was “going with the Officer recommendation”. Even in this instance, where there was explicit evidence of intention, nonetheless, the Courts ruled that there was no evidence that at the meeting itself the Member had a closed mind as there was no evidence to suggest that he wouldn’t have changed his mind as there was still the possibility that he might have changed his opinion depending on what he had heard.

Conclusion

28) The legislation is clear that whatever a Councillor says or does prior to the meeting cannot by itself, be used as evidence of predetermination or bias provided they conduct themselves appropriately and consider and weigh the matters at the meeting itself before reaching a decision.

29) Nonetheless, separate from the legal protection, Councillors also need to guard against the perception or unfounded allegations of predetermination and bias. Therefore, it is important for Councillors to explain that their views are preliminary and are not to be taken as their final decision and that they have retained an open mind and will listen to both sides of the argument before reaching a final conclusion.

Gifts and Hospitality

30) Councillors are no longer legally required to register gifts and hospitality. The key concern that may arise is that the acceptance of gifts and hospitality might give rise to a perception of actual or apparent bias.

31) Members should always approach decision-making with an open mind. There may be instances where offers and acceptances of gifts and/or hospitality may give the impression of real or actual bias. For example, if they are particularly lavish, frequent or timed to coincide with decision-making or from a company or community group which stands to be affected by the decision to be taken.

32) Consequently, members should always view offers of gifts and hospitality cautiously and particularly so if there is any association between the originator and any decision which a councillor will or may take. Remember, the *appearance* of bias - to a fair minded and informed observer’ (i.e. the courts) - is sufficient to potentially undermine an authority’s decision-making process.

33) Gifts and hospitality should never be sought or solicited; and where offered they should generally be declined; and certainly so if they relate to potential decision-

making, either at a specified or potential future time. This would protect the councillor, and the council, from allegations of bias and influence and would maintain the integrity of democratic decision-making.

- 34) It remains open to councillors voluntarily to register offers/acceptances of gifts as non-pecuniary interests should they wish to do so. The register of interests form contains a section where members can record any non-pecuniary interests in addition to the statutory disclosable pecuniary interests which they are required to record. Members are strongly advised to register such interests to demonstrate openness and transparency.

Bribery

Act

- 35) It is a criminal offence under the Bribery Act 2010 to request or receive money or other advantage in return for improperly doing or not doing an act as part of your Councillor role. Voluntary registration of gifts and hospitality received or offered protects both you and the Council from such allegations of corruption. The declaration form has a section which can be used for these voluntary disclosures of interest.

Membership of Organisations

- 36) Councillors and co-opted members will often be members of outside organisations, locally or nationally, either in their private capacity or as appointed by their councils. This can include community groups, lobby groups, political parties and trade unions.
- 37) An association with such a group could, conceivably, be a factor in any allegation of real or actual bias. This would depend on the circumstances of the case. Mere membership is unlikely to be an issue. However, active involvement in the promotion of a particular cause or object, if this is germane to a decision before the council, may well give rise to an appearance of bias.
- 38) In order to strengthen openness and transparency it is advisable for Members to register such membership in order to protect themselves and the Council from allegations of bias or of having a particular hidden agenda.
- 39) It is always open to members voluntarily to declare any other personal interests in that section of the Register of Interests Form provided for this purpose. If a member considers that a personal interest, other than a disclosable pecuniary interest, would conflict with their responsibilities to abide by the Seven Principles of Public Life (the 'Nolan Principles') then these can be included in that latter section of the form.
- 40) One of the Nolan Principles is that:

"Holders of public office must avoid placing themselves under any obligation to people or organisations that may try inappropriately to influence them in their work"

- 41) Therefore, members need to be mindful of any pronouncements they may make as part of such organisations, either on their behalf or individually.

Trade Union Representation

- 42) Insofar as any such association may involve sponsorship (by that organisation) e.g. by a Trade Union then registration is already required as a Disclosable Pecuniary Interest. The relevant Regulations explicitly provide that sponsorship includes “any payment or financial benefit from a trade union within the meaning of the Trade Union and Labour Relations (Consolidation) Act 1992”. This means that sponsorship by a trade union will be a disclosable pecuniary interest and should be registered as such.

Dual/Triple Hatted Members

- 43) Dual and triple-hatted members need to balance their legitimate right to express views while protecting the integrity of council decision making from allegations of real or apparent bias and predetermination arising from potential conflicts of interest between the two Councils he or she represents.**

- 44) Members of more than one local authority may occasionally find themselves in a position where they have made a decision or been consulted on a matter in one authority which then comes up for consideration in another authority. In those circumstances, advice should be sought from the Monitoring Officer as to whether or not the initial involvement precludes them from taking part in the decision making.

- 45) Members may also need to be cautious as to whether they can take part in a decision that has financial implications, either positive or negative, for the other public body. Again the advice of the Monitoring Officer should be sought.

Community meetings

- 46) Where a member agrees to chair a community or public meeting on a particular planning matter, the member should make it clear at the outset the capacity in which they are acting (e.g. as a facilitator to local discussion) and make a very clear statement setting out that they are taking part with an open mind. It is suggested that members' might want to use the following words to do this (varied to name the particular meeting) and perhaps to include a copy as an annex to the minutes:

I have agreed to chair this meeting [Liaison Committee etc] in order to enable meetings to take place between [local residents, the Parish Council, the operator, the landowner, the District Council through its officers, and other interested parties]. I intend to listen to the views and opinions put forward by all parties at this meeting but I would like to make it clear that insofar as there is any discussion or consideration of a proposal by any party that may require planning permission, all parties should be aware that notwithstanding anything I may hear or any comment I may make at these [Liaison] meetings, this is not

the correct forum to determine any such matters and that I will make my decision on such matters at the relevant Council meeting with an open mind and based on all the evidence presented at that meeting.

47) A version of this statement could also be made if a member is participating in, but not chairing, such a meeting, for the avoidance of doubt.

Code of Conduct

48) Members will be familiar with their responsibilities under the Code of Conduct to register and declare disclosable pecuniary interests and any other non-pecuniary interests which they wish to register. These provisions protect council decision-making, and members themselves, where private interests may otherwise conflict with public duties.

49) If you are a member of a planning committee you will also need to have regard to the specific guidance in the Council's Planning Code in relation to bias and predetermination.

Summary of Do's and Don'ts

50) The law of ***bias and predetermination*** protects the democratic decision making process such that decisions are taken properly and conscientiously, having due regard to advice and other material in the meeting, and what it said in the relevant debate.

Do's

- Members should not be afraid of holding or expressing views, even strong views - provided that they remain just that - ***views***
- Be careful not to convey the impression in the mind of a reasonable person (and before the decision in question) that you have already made up your mind 'come what may'
- Remember that the *appearance* of bias is sufficient to undermine the decision-making process even if you believe that no bias *actually* exists

Don'ts

- In expressing your views ahead of a decision, don't use extreme language that could indicate you've ***predetermined*** the matter already
- Allow your associations and memberships to create the *impression* of bias
- Accept gifts and/or hospitality that creates the impression of bias or corruption

51) For further advice about this guidance, and to discuss any particular scenarios, contact the Monitoring Officer on 0300 0030107 or kevin.lane@cherwellandsouthnorthants.gov.uk.