

# **PROBITY IN PLANNING PROTOCOL**

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# PROBITY IN PLANNING PROTOCOL

## 1. INTRODUCTION

- 1.1 Maintaining high ethical standards enhances the general reputation of the Council, its Members and its Officers. Open and transparent decision-making enhances local democracy and should lead to better informed citizens. A common understanding of the various roles, responsibilities and accountabilities should also enhance citizen participation.
- 1.2 Members are guided by the [Member] Code of Conduct. Officers are guided by the Employee Code of Conduct. Chartered Town Planners will also be guided by the Royal Town Planning Institute's (RTPI) Code of Professional Conduct.
- 1.3 The basis of the planning system is the consideration of private proposals against wider public interests. The successful operation of the planning system relies on mutual trust and understanding of each other's role. It also relies on both Members and Officers ensuring that they act in a way that is not only fair and impartial, but is also clearly seen to be so. Much is often at stake in this process, and opposing views are often strongly held by those involved. Whilst Development Control Board members have a special duty to their ward constituents, including those who did not vote for them, their over-riding duty is to the whole community. Councillors should not favour any individuals or groups and not put themselves in a position where they appear to do so. Although Councillors may be influenced by the opinions of others, they alone have the responsibility to decide what view to take. Councillors must, therefore, represent their constituents as a body and vote in the interests of the whole Borough. Councillors who do not feel that they can act in this way should consider whether they are best suited to serving on the Development Control Board.
- 1.4 This Protocol guides Members and Officers in the discharge of the Council's statutory planning functions and informs potential developers and the public generally, of the high standards of ethical conduct adopted by the Council, in the exercise of its planning functions. This Protocol supplements the [Member] Code of Conduct and the Employee Code of Conduct.
- 1.5 Reference to 'Development Control Board member(s)' in this Protocol, means a Member(s) who has been appointed to the Board's membership and includes a Member who may substitute for a Board member at a Board meeting or site visit.

## 2. THE PLANNING SYSTEM

- 2.1 Planning is not an exact science. Rather, it relies on informed judgement within a firm policy context. It is often highly contentious, because decisions of the Council, as local planning authority, affect the daily lives of everyone and the private lives of individuals, landowners and developers. This is heightened by the openness of the system, which actively invites public opinion before taking decisions and is reinforced by the legal status of development plans and decision notices. It is essential, therefore, that the planning process is characterised by open and transparent decision-making, that planning decisions are taken on proper planning grounds, are applied in a consistent and open manner and that Members and Officers are held accountable for those decisions.
- 2.2 One of the key purposes of the planning system is to ensure that development

takes place through a framework, whereby the public interest is well represented at every point, from the preparation of development plans and policies, the determination of planning applications and in undertaking enforcement action. In performing this role, planning necessarily affects land and property interests, particularly the financial value of landholdings and the quality of their settings. It is important therefore, that the Development Control Board should make planning decisions affecting these interests openly, impartially, with sound judgement and for justifiable planning reasons. The process should leave no grounds for suggesting that a decision has been partial, biased or not well-founded in any way.

- 2.3 The Human Rights Act 1998, and in particular Article 6, is concerned with guaranteeing procedural fairness in the determination of civil rights and obligations, especially the entitlement to a fair and public hearing within a reasonable time by an independent and impartial tribunal. These principles are at the heart of the planning system. The Human Rights Act 1998, therefore, provides additional safeguards for citizens and encourages the application of best practice in the planning process.

### **3. THE COUNCIL'S DECISION-MAKING FRAMEWORK**

- 3.1 The Development Control Board determines planning applications. The Cabinet is responsible for preparing/formulating the Core Strategy and other documents which form part of the statutory development plan; Supplementary Planning Documents (SPDs) and the Community Infrastructure Levy (CIL). The General Assembly of the Council (the GAC), adopts the development plan documents and the Community Infrastructure Levy. In the future, it will adopt Neighbourhood Plans, should they come forward. The responsibilities of the GAC, the Cabinet and the Development Control Board are set out in their Terms of Reference. The Local Development Framework Members' Working Group (LDF MWG) is responsible under its Terms of Reference, for acting in an advisory role to the Cabinet, in the preparation of the various stages of the Development Plan, SPDs and the CIL.

- 3.2 When determining planning applications, the Development Control Board must have regard to the statutory Development Plan, Government Guidance set out in the National Planning Policy Framework (NPPF) and SPDs, together with other material considerations. Applications must be determined in accordance with the Development Plan, unless material considerations indicate otherwise.

### **4. CODE OF CONDUCT**

- 4.1 The adopted [Member] Code of Conduct states:

'You must act solely in the public interest and should never improperly confer an advantage or disadvantage on any person or act to gain financial or other material benefits for yourself, your family, a friend or close associate.'

'You are accountable for your decisions to the public and you must co-operate fully with whatever scrutiny is appropriate to your office.'

'You must be as open as possible about your decisions and actions and the decisions and actions of the Council and should be prepared to give reasons for those decisions and actions.'

'You must promote and support high standards of conduct when serving in your public post, in particular as characterised by the above requirements, by leadership and example.'

4.2 The [Member] Code of Conduct covers issues central to the preservation of an ethical approach to Council business, including the need to ensure appropriate relationships with other Members, Officers and the public, which will impact on the way in which Councillors participate in the planning process. The following 'guiding principles' (explained in detail elsewhere in this Protocol), should assist you in complying with the Code.

- (a) Planning officers' views, opinions and recommendations are 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 Development Control Board or its members. You must never seek to pressure Officers to provide a particular recommendation - this does not prevent you from asking questions or submitting views to Officers, which may be incorporated in a committee report.
- (b) Do not 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 interest or prejudicial interest in a proposal, using your position to discuss that proposal with Officers or fellow Councillors, when members of the public would not have the same opportunity to do so.
- (c) If you propose to take part in the Development Control Board's decision making process, you must not give grounds to doubt your impartiality by:
  - making public statements about a pending decision before the Development Control Board meeting where it can be anticipated that the information required to take a decision will be available – such public statements could be seen as you prejudging a decision, or being biased in respect of, or be seen to be prejudging or demonstrating bias in respect of, the decision;
  - by indicating or implying your support or opposition to a proposal, or declaring your voting intention, before the meeting. Anyone who may be seeking to influence you must be advised that you will not formulate an opinion on a particular matter until all available information is to hand and has been duly considered at the relevant meeting.
- (d) When making a decision on a planning application, you may have to take account of different points of view or make decisions based on specified statutory criteria. It is your duty to ensure that decisions are properly taken and that the parties involved in the process are dealt with fairly. In making any decision, you should only take into account relevant and material considerations and you should discount any irrelevant or immaterial considerations.
- (e) To reduce the risk of your, or the Development Control Board's decisions being legally challenged, you must not only avoid impropriety, but must at all times avoid any occasion for suspicion and any appearance or perception of improper conduct. The responsibility for this rests with you.

- (f) Do not accept gifts, benefits 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. Remember to notify the Monitoring Officer of the offer and your acceptance of any gift, benefit or hospitably where its value is over £100.
- (g) If you have a disclosable pecuniary interest or prejudicial interest in an item under discussion at the Development Control Board meeting:
- unless you have a dispensation, you must not participate in the discussion and vote on the item and cannot be present in the public gallery/meeting room to observe the debate;
  - you must not make representations to Development Control Board members - written representations should be submitted to Officers;
  - you should approach other fellow Councillors to represent your constituents' views;
  - you must not attempt to lobby Development Control Board members about the matter, before, during or after a Board meeting/site visit, attempt to use your status as a Member to influence consideration of a submission, or try to get Officers to change a decision or recommendation;
  - you should avoid discussing your personal planning application with other Councillors and cannot ask a fellow Councillor to represent you at a Board meeting or make written representations on your behalf, on a personal planning application.

These rules apply to all members of the Council.

- (h) Be aware that a presentation by a developer, professional agent or applicant/landowner is a form of lobbying and you must not express any strong view or state how you or other Members might vote. Do refer those who approach you for planning, procedural or technical advice to Officers.
- (i) Do not agree to any formal meeting with applicants, developers or groups of objectors unless an Officer is present.
- (j) Notify the Monitoring Officer if you feel you have been exposed to undue or excessive lobbying or approaches (including inappropriate offers of gifts, benefits or hospitality).
- (k) If, as a Development Control Board member, you have decided in advance that you will take a particular view on a planning application or that on an objective analysis of the facts, a fair minded observer would conclude that there is a real possibility of bias on your part, you:
- must not participate in the discussion and vote on the item;
  - cannot be present in the public gallery/meeting room to observe the debate;
  - must not make representations to Development Control Board members - written representations should be submitted to Officers;
  - should approach other fellow Councillors to represent your constituents' views;
  - must not attempt to lobby Development Control Board members about the matter, before, during or after a Board meeting/site visit, attempt to use your

status as a Member to influence consideration of a submission, or try to get Officers to change a decision or recommendation.

- (l) Where you have a responsibility for making a formal decision, you must not only act fairly, but also be seen as acting fairly ('quasi-judicially') in the decision-making process.
  
- (m) As a Development Control Board member, you will not have fettered your discretion or breached this Protocol through:
  - listening or receiving viewpoints from residents or other interested parties;
  - making comments to residents, interested parties, other Members or Officers, provided they do not consist of or amount to pre-judging the issue and you make clear you are keeping an open mind;
  - seeking information from planning officers; or
  - being a vehicle for the expression of opinion or speaking at the meeting as a ward Member, provided you explain your actions at the start of the meeting or item and make it clear that, having expressed the opinion or ward/local view, you have not committed yourself to vote in accordance with those views and will make up your own mind having heard all the facts and listened to the debate.

**NB:** Central to a Court of Appeal case (Wokingham Borough Council. v. Scott and others [2019] EWCA Crim 205), was disclosure of emails from councillors' personal email accounts, which had been used to communicate with other councillors and planning officers about a planning related matter. This case highlighted the need to be aware of the effects of statements made by councillors and officers in the minds of potential defendants and to be alive to the need to conduct discussions with good sense on each side and in good faith.

### 4.3 Disclosing Interests

- 4.3.1 If you have a disclosable pecuniary interest or prejudicial interest in a matter to be considered, or being considered at a meeting, you must:
  - (a) disclose the interest; and
  - (b) explain the nature of that interest at the commencement of that consideration or when the interest becomes apparent (subject to para.4.3.2 of this Protocol); and unless you have been granted a dispensation:
  - (c) not participate in any discussion of, or vote taken on, the matter at the meeting; and
  - (d) withdraw from the meeting room whenever it becomes apparent that the business is being considered; and
  - (e) not seek improperly to influence a decision about that business.
  
- 4.3.2 Where your disclosable pecuniary interest or prejudicial interest has been agreed by the Monitoring Officer as being a sensitive interest, you need only disclose the existence of the interest, but not its nature.
  
- 4.3.3 The responsibility for declaring a disclosable pecuniary interest or prejudicial interest rests with you.

## 5. POLICY AND STRATEGIC ISSUES

- 5.1 As a Councillor, you may discuss or debate matters of policy or strategy, even though these may provide the framework within which individual applications will in due course be decided by the Development Control Board. Therefore, if you have a key role in establishing planning policies for the area, you are fully entitled to express your views or advocate proposals for the making, approval or amendment of the Development Plan, including SPDs published by the Council as local planning authority, both relating to general policies for the Borough of Dartford and to briefs and master plans prepared for specific sites in anticipation of planning applications.
- 5.2 The Development Control Board may also be asked to comment on requests to the Council as local planning authority for a provisional view as to whether - in respect of a proposal for a major development, the Council (as local planning authority) might be minded, in principle, to consider granting planning permission. This may occur in cases where developers are seeking the planning authority's view in advance of committing to expensive and lengthy technical appraisals. The Development Control Board may form a provisional view and as a member of the Board, you are entitled to express an opinion in advance of the statutory application for planning permission being submitted to the Board formally for determination. However, you must not express a view once the application has been received, as this could compromise your and the Board's impartiality (see sections 9 & 10 of this Protocol on predetermination and bias).

## **6. DEVELOPMENT PLAN PREPARATION**

- 6.1 Cabinet Members may be involved in discussions with a number of third parties over development proposals within the Borough and may also themselves have ideas on the future development of/within the Borough. Members should always be mindful that third parties may wish to influence them over the Development Plan's content, for their own or others' personal benefit.
- 6.2 Cabinet members must exercise their own judgement in deciding whether they might be influenced or could be seen as being influenced over the LDF's preparation. If it could be reasonably considered that discussions with third parties are such as to lead Members to be influenced or seen to be influenced, the following should apply;
- any discussions with the third party over the contents of the Development Plan should be recorded and submitted to the Head of Planning Services;
  - where a third party is lobbying to advance a particular site or policy stance for inclusion in the Development Plan, any meetings with that third party should be recorded and be held in the presence of the Head of Planning Services or a nominated representative. Similarly, any Officer should only hold such discussions in the presence of a colleague.
- 6.3 In any discussion with the third party, Members should make it clear:
- (a) that consideration of any particular proposal will have to be judged against the advice of professional Officers of the Council and the statutory planning framework;



- (b) that it is for the Council to make the final decision through its formal decision making procedures.

6.4 Should a Cabinet member with portfolio responsibility for strategic development be able to vote on planning applications? The appropriate action is not clear cut and will depend on the circumstances of a particular case. However, the general advice is that a Member in such circumstances, may well be so committed to a particular view as a result of their Cabinet/portfolio responsibility, that they may not be able to demonstrate that they are able to take account of all material considerations before a final decision on a planning application is reached (see sections 9 & 10 of this Protocol on predetermination and bias).

## **7. REPRESENTING CONSTITUENTS** *See Flowchart at Appendix 1*

### 7.1

- (a) Under the Council's Standing Order 36, subject to not having a disclosable pecuniary interest or prejudicial interest in the item, and subject to the Chairman's agreement, a non-Development Control Board member may, on the giving of 24 hours' notice in writing<sup>1</sup> to the Democratic Services Manager, request to speak on any item(s) on the Board's agenda. The decision to accept such a request will be at the Chairman's discretion and his/her decision will be final.

Please note that Councillors cannot 'stand in' for a speaker who has registered to speak at the Board meeting (see section 7.5 of this Protocol).

- (b) As a non-Development Control Board member:

- (i) If you have a disclosable pecuniary interest or prejudicial interest, you can still present your views or those of your constituents in the following ways:
  - (aa) you can make written representations to Officers (not fellow Councillors), providing you disclose the existence and nature of your interest and do not seek preferential consideration for your representations;
  - (bb) if you have been asked to represent a constituent(s), you should formally advise them about your disclosable pecuniary interest or prejudicial interest;
  - (cc) unless you have been granted a dispensation to appear at the Board meeting, you can arrange for another Member to represent your constituents' views at the Board meeting - this Member should make it clear to the Development Control Board that he/she is acting in the place of a Member who has a disclosable pecuniary interest or prejudicial interest in the matter.
- (ii) The legal principles of 'predetermination' and 'bias' (sections 9 & 10 of this Protocol) will not apply to you, as you take no part in the Board's decision making process.

7.2 As a Development Control Board member, if you have a disclosable pecuniary interest or prejudicial interest in an application before the Development Control Board, you can still present your views or those of your constituents to the Board meeting through the ways described in section 7.1(b)(i) of this Protocol.

7.3 When representing your constituents, your overriding duty is to the whole community, not just to the people in your ward and, taking account of the need

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<sup>1</sup> Includes notification by email

to make decisions impartially, that you should not improperly favour, or appear to improperly favour, any person, company, group or locality.

#### 7.4

- (a) If you are representing an applicant or constituent in a professional capacity e.g. as a paid agent or advocate, you will have a vested interest in the outcome and therefore a prejudicial interest.
- (b) If you wish to act on behalf of applicants or constituents in a professional capacity, remember that the efficacy of acting in a representative capacity, relies on you being present throughout the Development Control Board's decision making process but that, in accordance with section 4.3 of this Protocol, the efficacy of your representation is significantly reduced by the requirement on you, to leave the meeting room prior to the item being discussed and voted on.
- (c) Planning applications involving representation by councillors in a professional capacity, will be reported to the Development Control Board as main items, and not dealt with by Officers under delegated powers.

7.5 The Board's decision making process must be seen to be fair and impartial from the perspective of an external observer. Therefore, Councillors cannot 'stand in' for a speaker who has registered to speak at the Board meeting<sup>2</sup> To do otherwise, could leave the Board decision making process open to accusation of partiality or undue influence.

### **8. MEMBERSHIP OF LOBBY, CAMPAIGN GROUPS & CLUBS & SOCIETIES (UNINCORPORATED ORGANISATIONS)**

8.1 If the matter to be discussed at a Development Control Board meeting has a direct impact on a lobby, campaign group or club or society of which you are a member, you will most likely have a prejudicial interest. 'Direct impact' in this context means anything that directly affects the rights and obligations of a group, club etc - e.g. a planning application submitted by a lobby group.

8.2 Matters that relate to the issues on which a group campaigns or has expressed public opinions about, without affecting the operation of the group directly, has an indirect impact on that group. If the matter to be discussed at a Development Control Board meeting relates indirectly to a lobby or campaign group of which you are a member, you may, depending on the facts, have a prejudicial interest. You need to consider the following factors in determining whether you have a prejudicial interest in a matter of indirect impact:

- (i) the nature of the matter to be discussed;
- (ii) the nature of your involvement with the lobby or campaign group;
- (iii) the publicly expressed views of the lobby or campaign group;
- (iv) what you have said or done in relation to the particular issue.

8.3 Your membership of, or you leading or representing an organisation whose primary purpose is to lobby to promote or oppose planning proposals may raise bias and predetermination considerations (see section 9 & 10 of this Protocol).

8.4 It is possible that, in certain circumstances, membership of a private club or

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<sup>2</sup> Refer to the Protocol for Public Speaking at Development Control Board

society could give rise to a prejudicial interest or bias or predetermination considerations.

## 9. KEEPING AN OPEN MIND

*Predetermination (i.e. a mind that is closed to the consideration and weighing of relevant factors in the decision making itself) is a legal concept that the courts have always applied to local authority decision making and predates the [Member] Code of Conduct and is not altered by it*

*A Development Control Board member with a pre-determined view on a planning application, is disqualified from participating in the Board's decision-making on the application.*

- 9.1 Central to the determination of planning applications by the Development Control Board, is the principle that Members who determine planning applications should come to the Board meeting with an open mind and be ready to hear and consider all arguments relating to the application. Development Control Board members are, of course, free to form a personal opinion on a planning application, listen to a point of view about a proposal, give procedural advice and agree to forward any comments to Officers, but should not publicly commit themselves to a particular point of view on a planning application prior to its full consideration at the Development Control Board meeting, as this could be perceived by others, as the Member having closed his/her mind to hearing all the relevant considerations and/or other relevant considerations.

The legal principle of predetermination applies to a decision maker when making the decision. Where for example, a Development Control Board member has publicly committed themselves to a particular point of view (e.g. supporting or opposing a proposal or declared their voting intention before the matter has been fully reported to the Development Control Board), that may amount to predetermination, were that Member to participate in the decision on that application.

- 9.2 A public statement by a Development Control Board member saying that they are open to persuasion on a particular application, may not be sufficient to prove they are not predetermined – they must genuinely be open to persuasion of the planning merits of the decision in question. It is for the courts to determine if a decision is flawed, because a Member was not open to persuasion on the merits of the case.

### **Example of predetermination**

This proposal is a disaster waiting to happen. Under no circumstances could I ever support approval of this application. The applicant needs to go back to the drawing board and have a complete rethink or, ideally, he should do us all a favour and abandon this completely.

- 9.3 If a Development Control Board member is 'predetermined' on an application, they will be disqualified from taking part in the Board meeting and decision-making process on the application and must withdraw from the meeting room during consideration of the application. A 'predetermined' Board member may however, make written representations to Officers (not fellow Councillors) and/or arrange for another Member to represent their constituents' views at the

Board meeting.

- 9.4 Development Control Board members are not prevented from having a predisposition (i.e. preparedness to consider and weigh relevant factors in reaching the final decision) towards a particular outcome for a planning application as they are entitled to begin forming a view on the application as more information becomes available before the Board meeting, but if they have formed a provisional view, they must still be willing to consider all arguments presented at the Board meeting and be open to persuasion on the merits of the application, as a decision on the application can only be taken by the Board after all available information is to hand and has been duly considered. *It is important that Development Control Board members be open to any new argument at all times up to the moment of decision.*

There is a clear parallel with section 25 of the Localism Act 2011, which confirms that a councillor should not be held to have a closed mind just because they have previously indicated a view on a matter relevant to a decision.

#### **Examples of predisposition**

- I am very concerned about the impact of this proposal on the local highway network. It already takes 25 minutes to get through the crossroads at peak times. I want to see convincing evidence from the applicant that this proposal will not make matters even worse.
  
- This proposal is in the Green Belt and the proposed extension would be inappropriate development. Its design does not seem to be particularly sympathetic to its surroundings. In such a prominent location, there is real potential for such a development to have a very damaging effect on the open character of the area. Green Belt development needs to be handled particularly sensitively. Therefore, unless the applicant can convince me that this would be an appropriate development in the Green Belt or there are very special circumstances why it should be approved, then I cannot currently see how I will be able to support this application. The applicant needs to make a stronger case and provide more information.

- 9.5 A Development Control Board member will not have fettered their discretion merely by listening to and receiving representations from residents or interested parties, making comments to such people or being a vehicle for the expression of local opinion at a Board meeting, provided they make it clear that they are not already committed to voting in accordance with those views.

- 9.6 It is important that no Development Control Board member comes to a Board meeting with a pre-determined view on any planning application. If a Development Control Board member is seen to have predetermined their view and fettered their discretion and then takes part in the Board's decision – making process, it will put the Council at risk of a maladministration complaint or legal proceedings on the grounds of the decision being tainted with bias.

- 9.7 If a Development Control Board member decides in advance that they are bound to take a particular view on an application (for example because it is so controversial with constituents in their ward) then that will preclude the Member from participating in the Board's decision - making process in relation to the application. In effect, the Member has to choose between publicly supporting

or opposing a particular application and retaining their ability to participate in the Board's decision-making process.

Explain that you do not intend to speak and vote because you have or you could reasonably be perceived as having judged (or reserve the right to judge) the matter elsewhere, so that this may be recorded in the minutes.

9.8 A Development Control Board member may consider that they run too great a risk of becoming identified with one side of the argument no matter what safeguards they take. In these circumstances, the only wise course is to withdraw from the Board's decision-making process on that application.

9.9 Development Control Board members may receive correspondence from constituents, applicants and developers asking them to support or oppose a particular proposal. Members should acknowledge the correspondence by saying that the matter has been referred to the Head of Planning Services. Condoning a point of view in advance of all the planning considerations of a proposal being reported to the Development Control Board will raise the issue of pre-determination and will prevent the Member from fully taking part in the determination of the application.

9.10 Development Control Board members should not attend a planning presentation unless an Officer is present and/or it has been organised by Officers. Remember that the presentation is not part of the formal process of debate and determination of any subsequent application.

## 10. BIAS

10.1 A Development Control Board member should not form or show bias against, or, in favour of any particular person, company or group or any particular site or locality, nor give the appearance of bias (bias may include pre-judged ideas based on the Member's own prejudices or political affiliations). It does not matter whether there is actual bias – the legal test for apparent bias is whether a fair minded observer aware of all the facts would conclude there was a real possibility of bias.

If a Development Control Board member has formed or shown bias against, or, in favour of any particular person, or there is an appearance of bias in a particular application, the Member will be disqualified from taking part in the Board meeting and decision-making process, but may make written representations to Officers (not fellow Councillors) and/or arrange for another Member to represent their constituents' views at the Board meeting.

**Example** - You are a member of the Development Control Board and have made a particular issue a centrepiece of your election campaign, or were elected on the basis of a single-issue campaign, but are not a member of a related lobby group. Here, you will not have a prejudicial interest. However, you still need to consider whether you are genuinely open to persuasion about the matter.

**Example** - You are a member of the Development Control Board and a director of a housing association with an interest in tendering for the delivery of the affordable housing scheme part of the development. In your capacity as director of the housing association, you will be automatically disqualified from

participating in the decision making process on the planning application by reason of the appearance of bias i.e. the interest of the housing association and your interest as director of the housing association in having the planning permission approved, are aligned<sup>3</sup>.

10.2 Participation in the decision-making at Development Control Board by a Member disqualified by bias, potentially invalidates the decision.

## **11. DUAL - HATTED MEMBERS**

11.1 Councillors often consider issues at more than one tier of local government, including speaking and voting in all tiers. For example, councillors may be a borough/parish and county councillor.

11.2 Parish/Town Councils are consultees on planning applications. A Development Control Board member who is also a Parish/Town Councillor may take part in the debate on a planning application at the Parish/Town Council provided they:

(i) do not have a disclosable pecuniary interest or prejudicial interest in the application;

(ii) make it clear to the Parish/Town Council as consultee body:

- that their views are expressed on the limited information before them; and
- that they reserve judgement and the independence to make up their own mind on the application, based on their overriding duty to the whole community and not just to the people in that area, ward or parish, as and when it comes before the Development Control Board and they hear all of the relevant information; and
- that they will not in any way commit themselves as to how they or others may vote when the application comes before the Board.

11.3 The principles referred to in para.11.2 above, apply to the Council's Development Plan proposals that particularly affect a parish. Subject to not having a disclosable pecuniary interest or prejudicial interest, a Member may speak and vote on an issue relating to the Council's Development Plan that particularly affects their parish.

11.4 A Parish/Town Councillor who also sits on the Development Control Board will have a prejudicial interest in a planning application submitted by their Parish/Town Council.

## **12. PRE-APPLICATION DISCUSSIONS**

12.1 Discussions between a potential applicant and the Council as local planning authority prior to the submission of an application, can be of considerable benefit to both parties and is encouraged by the Audit Commission - 'Building

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<sup>3</sup> Kelton v Wiltshire Council [2015] EWHC 2853 (Admin) (QBD) and see Porter v Magill [2002] 2 AC 357 for test of bias

in Quality' (paragraph 56). It is also encouraged by the Local Government Association and the National Planning Forum. However, it would be easy for such discussions to become, or be seen (especially by objectors) to become, part of a lobbying process.

12.2 When involved in pre-application discussions, Officers should always act fairly to all and completely impartially, by providing accurate advice and assistance when required or requested by the general public, developers or Members. A written record of all such discussions should be retained on the planning file.

12.3 Occasionally, the Development Control Board Chairman or other Board members may be invited to attend pre-application discussions with an applicant. Where Members choose to accept the invitation, they should be accompanied by an Officer and a written note made of the discussion and retained on the planning file. For Board members to do otherwise, could leave them open to accusation of partiality or undue influence.

12.4 Pre-application discussions should take place within clear guidelines and the same considerations should apply to any discussions which take place before a decision is taken or when the application is submitted to the Council, as local planning authority:

- it should always be made clear at the outset, that the discussions will not bind the Council to making a particular decision and that any views expressed are personal and provisional. By the very nature of such meetings, not all relevant information may be at hand, nor will formal consultations with interested parties have taken place;
- advice should be consistent and based upon the Development Plan and material planning considerations, including the NPPF/SPDs. There should be no significant difference of interpretation of planning policies amongst Planning Officers. In addition, all Officers taking part in such discussions should make clear whether or not they are the decision-maker under delegated powers;
- a written note should be made of all meetings. At least one Officer should attend such meetings and a follow-up letter is advisable at least when documentary material has been left with the Council. A note should also be taken of telephone discussions, where any professional advice is given;
- care must be taken to ensure that advice is not partial, nor seen to be.

### **13. OFFICER REPORTS**

13.1 To avoid public concern and a loss of confidence in the planning system, and in order to avoid criticisms relating to inadequate consideration of the issues, inconsistency of decision-making, or claims of unclear or non-existent reasoning behind a recommendation or no recommendation, Officers should have regard to the guidelines set out below. It is particularly important to do so, not only as a matter of good practice, but because failure may constitute maladministration, and/or give rise to judicial review on the grounds that the decision was not taken in accordance with the provisions of the Development Plan and the Council's statutory duty under Section 54A of the Act.

- reports must be accurate and cover, among other things, the substance of objections and the views of people who have been consulted;
- relevant points must include a clear exposition of the Development Plan, site or related history, and any other material considerations;
- reports must have a written recommendation of action;
- oral reporting (except to update a report) is extremely rare and must be carefully minuted when it does occur;
- reports must contain a technical appraisal which clearly justifies the recommendation;
- reports must contain an appraisal of the human rights implications relevant to the issue and which clearly justifies that any interference is 'proportionate' to the aims of the legislation;
- if the report's recommendation is contrary to the provisions of the Development Plan, the material considerations, which justify this, must be clearly stated.

### **13.2 Decisions Contrary to Officer Recommendation and/or the Development Plan**

13.2.1 The law requires that where the Development Plan is relevant, decisions should be taken in accordance with it, unless material considerations indicate otherwise (Section 54A of the Act).

13.2.2 If the Development Control Board makes a decision contrary to the Officer's recommendation (whether for approval or refusal), the Officer should always be given the opportunity to explain the implications of the contrary decision. Unless the Board's argument against the Officer's recommendations are very clear and substantiated on planning grounds, the application should be deferred to enable the Officer to draft a further report for a subsequent meeting of the Board, outlining the implications of making a decision contrary to the Officer's recommendation. The Board's reasons must be formally recorded in the minutes.

13.2.3 When a planning application has been deferred following a resolution of 'minded to approve' or 'minded to refuse', contrary to the Officer's recommendation, then at the subsequent Board meeting, the Head of Planning Services will have the opportunity to respond both in a further written report and orally, to the reasons formulated by the Board for granting or refusing permission. If the Board is still of the same view, then it will again consider its reasons for granting or refusing permission, and a summary of the planning reasons for that decision will be given, which reasons must then be formally recorded in the minutes of the meeting.

13.2.4 The Courts have expressed the view that reasons should be clear and convincing. The personal circumstances of an applicant will rarely provide such grounds. A notable exception is where planning policy allows for this e.g. a dwelling for an agricultural worker.

13.2.5 In the case of conditions which the Board wishes to add or amend, the Officer should be invited to draft the condition and either refer this to



the Board for approval at a subsequent meeting, or agree the condition with the Board Chairman.

#### **14. PLANNING APPLICATIONS SUBMITTED BY COUNCILLORS, OFFICERS AND BY THE COUNCIL**

14.1 Proposals to the Council, as local planning authority, by serving and former (within the last four years) Councillors and their family or close associates etc, can easily give rise to suspicions of impropriety. Although it is perfectly legitimate for such proposals to be submitted, it is vital to ensure that they are handled in a way that gives no grounds for accusations of favouritism. Members will need to consider the rules on disclosable pecuniary interests and prejudicial interests when such applications are submitted (see section 4.3 of this Protocol).

Do notify the Monitoring Officer in writing, of your own application or if you have an interest in an application and note that:

- you should send the notification no later than submission of the application to the Council as local planning authority;
- your application will always be reported to the Development Control Board and not dealt with by Officers under delegated powers; and
- it is advisable that, in relation to your application, you employ an agent to act on your behalf in dealing with Officers and any public speaking at the Development Control Board meeting.

14.2 Proposals for the Council's own development can take the form of either planning applications or Development Plan proposals. Such proposals can easily give rise to suspicions of impropriety. It is vital to ensure that they are handled in a way that gives no grounds for accusations of favouritism. Proposals for the Council's own development must be treated in the same way as those by private developers. The Development Control Board will normally be the appropriate forum for determining the Council's major development proposals with minor proposals being dealt with by Officers under delegated powers.

14.3 Planning Officers should not submit applications on behalf of third parties except as part of their duties as Council employees. In cases where Planning Officers or members of their family submit applications for planning permission, the Head of Planning Services should be notified and the proposals reported to the Development Control Board and not dealt with by Officers under delegated powers.

#### **15. SITE VISITS**

15.1 Site visits are arranged before a Development Control Board meeting and are treated as an opportunity to seek additional information and to observe the application site. The lack of any common approach on when and why to hold a site visit and how to conduct it, may leave the Development Control Board open to the accusation that it is, at best, arbitrary and unfair and, at worst, a covert lobbying device. All site visits are therefore conducted in accordance with the 'Site Visit Procedure' adopted by the Development Control Board from time to time.

- 15.2 **Interests:** Any Councillor (including Development Control Board members) with a disclosable pecuniary interest or prejudicial interest in a planning application, must not attend a site visit relating to that application.

**Predetermination (approaching a decision with a closed mind):** Development Control Board members who have fettered their discretion by publicly committing themselves to a particular point of view (e.g. supporting or opposing a planning application or declaring their voting intention or a firm view on the merits of an application before the Board meeting) cannot attend the site visit relating to that application. Members in this position should be mindful that they must not attempt to lobby other Board members about the matter at any time nor should they attempt to use their status as a Member to influence consideration of a submission, or try to get officers to change a decision or recommendation.

**Bias:** Where a Development Control Board member's interest in the planning application may give rise to an appearance of potential bias, they should not participate in the site visit.

**Predisposition (without amounting to apparent bias):** Where Development Control Board members have formed a provisional view towards a particular outcome, but remain prepared to consider and weigh relevant factors in reaching the final decision, they may attend a site visit and raise questions etc.

- 15.3 The deferral of an application for a site visit should not be on the basis of exposing Development Control Board members to local opinion, but should be on sound and proper planning grounds, which will be recorded in the minutes of the Board meeting.
- 15.4 Members should avoid discussing the merits of any planning application and should avoid expressing views that could be perceived as prejudicial to the determination of the application.
- 15.5 Planning Services will inform the ward Member of the date and time of the site visit.
- 15.6 A Development Control Board member who proposes the site visit should attend the site visit or arrange for a substitute Member to attend. If the site visit arises as a result of a deferral by the Board, the Member who seconds the proposal, should also attend the site visit or arrange for a substitute Member to attend.
- 15.7 Subject to not having a disclosable pecuniary interest or prejudicial interest in the application the subject of the site visit, ward Councillors may attend and participate in site visits.
- 15.8 Members should only enter a planning application site as part of an official site visit.
- 15.9 Prospective election candidates who are not already Council members, may attend a site visit on the same basis as members of the public.

## 16. PUBLIC SPEAKING

16.1 The Development Control Board allows for public participation in its meetings, in accordance with the 'Protocol for Public Speaking at Development Control Board Meetings'. During public speaking, the following should not occur:

- Members should not ask leading questions of Officers or speakers as by way of introducing new facts to the debate;
- Members should only ask relevant planning-related questions; and

16.2 Late evidence will only be introduced with the agreement of the Development Control Board Chairman.

## **17. ROLE OF CHAIRMAN**

The Development Control Board Chairman should ensure that:

- 17.1 Members' comments at Board meetings only relate to the planning merits of the application before them;
- 17.2 Reference at Board meetings to non-planning issues by the public and or Members are discouraged;
- 17.3 Cross-questioning of speakers should only take place, if there is need for clarification of what a speaker has already outlined; and
- 17.4 Members and the public should be made aware that the late submission of representations will normally not be permitted at Board meetings, as this can lead to allegations of unfairness.

## **18. TRAINING**

18.1 Specialised training sessions are designed to extend Members' knowledge of planning law, regulations, procedures, codes of practice and the Development Plans and thus assist them in carrying out their role properly and effectively.

18.2 Development Control Board members are required to attend training on the [Member] Code of Conduct and the application of disclosable pecuniary interests, prejudicial interests, predetermination and bias in the decision making context. Members who fail to attend such training are excluded from meetings of the Development Control Board until they have been trained.

18.3 Training may include a balance of the following:-

- organised visits to review permissions granted, with evaluation and lessons learned presented as a paper;
- special topic groups to consider thorny issues in depth;
- formal training by internal and external speakers;
- visits to other authorities who have received good inspection/audit feedback;

- brief presentations by Officers on hot topics, e.g. new legislation, white papers and their impacts, followed by a brief question and answer session;
- attendance at inquiries, where Officers have identified there is something specific that will be of interest to Members.

## **19. OMBUDSMAN & COMPLAINTS ABOUT THE ADMINISTRATION OF PLANNING APPLICATIONS**

- 19.1 The Commission for Local Administration ('the Ombudsman') is a principal mechanism for accountability in respect of local authority administration, and constitutes an independent system for the investigation and resolution of complaints of injustice caused by the maladministration (with injustice or without injustice) of local authorities (and of certain other bodies).
- 19.2 Members of the public who claim to have sustained injustice in consequence of maladministration in connection with action taken by or on behalf of the Council, can bring a complaint, or can have a complaint brought on their behalf, and on occasions may ask Councillors to take a complaint forward on their behalf.
- 19.3 Although complainants can approach the Ombudsman at any time, the Council must first be given an opportunity to answer the complaint, through its Corporate Complaints Procedure. The Ombudsman may ask what efforts, if any, have been made to resolve concerns personally and locally, and may encourage and assist complainants to make this effort.
- 19.4 The Ombudsman has discretion as to whether or not to investigate a complaint, although such discretion must be exercised reasonably.
- 19.5 In assessing a complaint, the Ombudsman will not be concerned with the nature, quality or reasonableness of the decision itself. Of concern, will be the manner in which Development Control Board decisions are reached and the manner in which they are, or are not, implemented.
- 19.6 The five most common causes of maladministration relate to:
- unreasonable delay in taking appropriate action;
  - failure to provide adequate information, explanation or advice to users;
  - failure to take appropriate action;
  - taking incorrect action;
  - failure to investigate an issue properly.
- 19.7 So that complaints may be fully investigated and, in any case, as a matter of general good practice, record keeping should be complete and accurate. Omissions and inaccuracies could, in themselves, cause a complaint or undermine the Council's case. The guiding rule is that every planning application file should contain an accurate account of events throughout its life. It should be possible for someone not involved with an application, to understand what the decision was and how and why it was reached. Particular care needs to be taken with applications determined under the Scheme of Delegations for Officers, where there is no Development Control Board report. Such decisions should be documented and recorded in the same way as those taken by the Board.

19.8 Appeals against refusal of planning permission are dealt with by the Planning Inspectorate of the Department for Communities and Local Government.

## **20. COMPLAINTS AND ALLEGATIONS OF BREACHES OF THIS PROTOCOL**

20.1 Allegations of any failure of a Member to meet this Protocol must be made in writing, to the Monitoring Officer. The Monitoring Officer will consider how the complaint or allegation should be dealt with. At a minor level, this may be no more than informally referring the matter to the Leader of the relevant party group. More serious complaints may result in an investigation and a hearing before the Hearing Panel.

20.2 Allegations of any failure of an Officer to meet this Protocol must be made in writing, to the Head of Paid Service and Monitoring Officer who will consider how the complaint or allegation should be dealt with. A breach of this Protocol by an Officer, may lead to an investigation under the Council's Disciplinary Policy and Procedure.

## **21. OVERSEEING COMPLIANCE WITH THIS PROTOCOL**

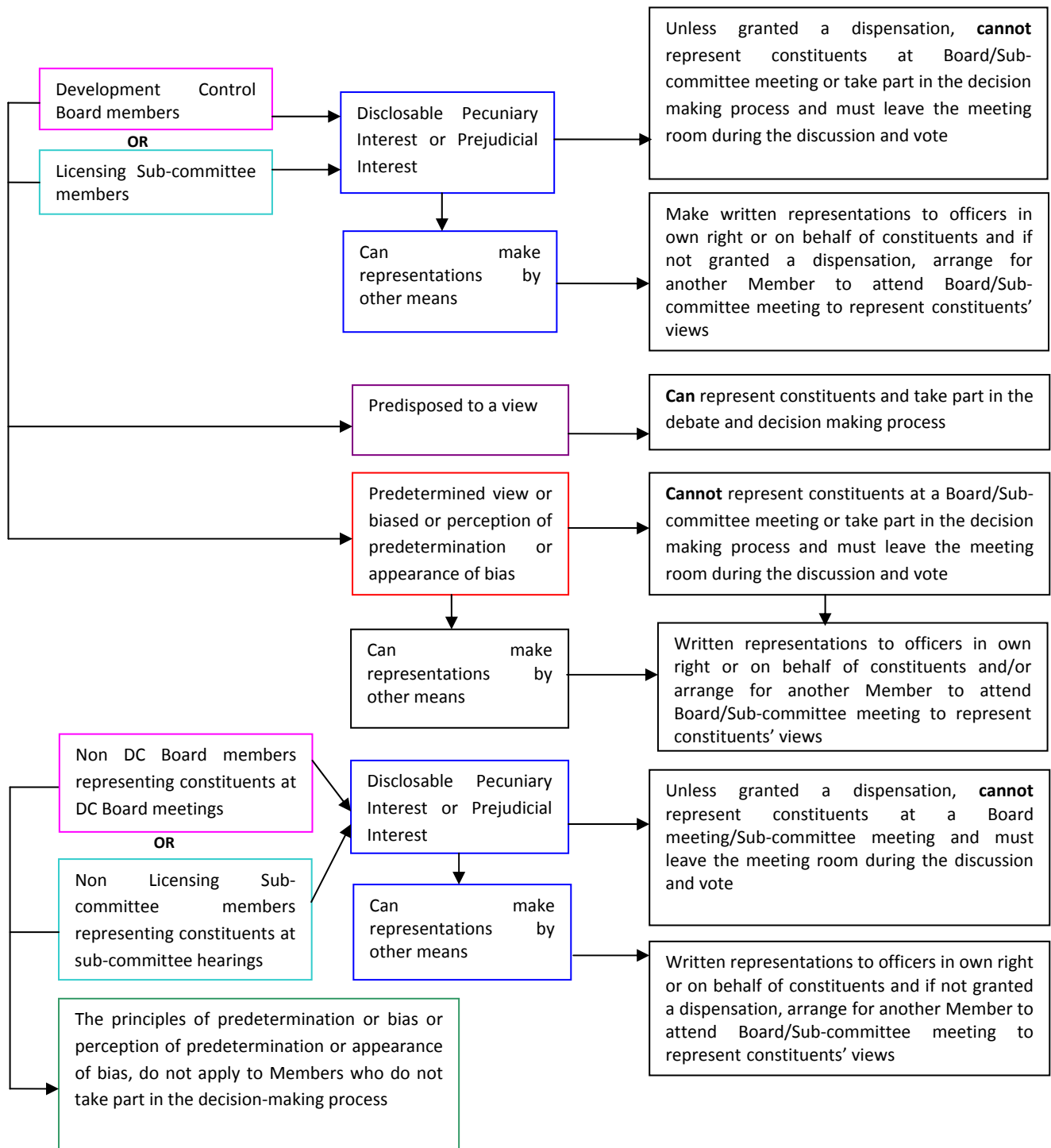
The Audit Board oversees compliance with this Protocol.

## **22. FURTHER GUIDANCE**

Further advice or clarification can be sought from the Head of Legal Services & Monitoring Officer.

Adopted by the Development Control Board 12 July 2007 Min. No.67  
Revised and adopted by the Development Control Board 02.04.2009 Min. 200  
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Reviewed under Directors' delegated authority- 19 January 2021  
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Reviewed under delegated authority- 16 December 2021  
Reviewed under delegated authority- 25 July 2022Reviewed under delegated authority – 7 September 2022

## APPENDIX 1 - A COUNCILLOR'S REPRESENTATIONAL ROLE – DEVELOPMENT CONTROL BOARD AND LICENSING SUB-COMMITTEE



## SITE VISITS – DEVELOPMENT CONTROL BOARD AND LICENSING SUB-COMMITTEE

