



Section D

PROBITY IN PLANNING - A LOCAL CODE OF PRACTICE

1. Introduction

- 1.1 This Probity in Planning Code ("the Code") applies to all Eastbourne Borough councillors and officers involved in the planning function.
- 1.2 Planning has a positive and pro-active role to play at the heart of local government. Good planning stimulates growth and promotes innovation.
- 1.3 The planning system works best when members, officers and all other people essential to its effective operation clearly understand their roles and responsibilities.
- 1.4 Planning decisions involve balancing:
 - the needs and interests of individual residents and the community, with
 - the need to maintain impartial decision-making in what may be highly controversial circumstances.
- 1.5 This Code gives guidance on achieving this balance, taking into consideration the latest advice from a recent review (the Killian Pretty review) commissioned by the Government on all aspects of the planning application process. Whilst the Code is designed primarily for those members and officers involved in plan making and the development control process, it will also assist members of Standards Committee and those involved in Scrutiny when they deal with planning matters.

2. The General Role and Conduct of Councillors and Officers

- 2.1 Members and officers have different but complementary roles. Both serve the public however members are responsible to the electorate whilst officers are responsible to the Council as a whole. Officers advise members and the Council and carry out the Council's work. They are employed by the Council, rather than by individual councillors. It follows that instructions may only be given to officers through a decision of the Council or its Cabinet or Committee. Any other system is open to question. A successful relationship between members and officers can only be based, upon mutual trust and understanding of each others

positions. This relationship and the trust which underpins it must never be abused or compromised.

- 2.2 Both members and officers are guided by Codes of Conduct. The Code of Conduct for members ("the Code of Conduct") supplemented by guidance from Standards for England, provides guidance for members. Officers who are Chartered Town Planners are guided by the RTPIs Code of Professional Conduct, breaches of which may be subject to disciplinary action by the Institute.
- 2.3 The Code of Conduct sets out the standards of behaviour required of councillors. It covers issues central to an ethical approach to Council business. These include the need for members to register and declare interests, and to maintain professionalism and integrity in their dealings with other members, staff and the public. The Code of Conduct impacts on the way in which members participate in the planning process. Of particular relevance to members making decisions on planning applications and planning policies is paragraph 6(a), which states that a member:-
- “must not use or attempt to use your position as a member improperly to confer on or secure for yourself or any other person, an advantage or disadvantage”.
- 2.4 The basis of the planning system is the consideration of private proposals against wider public interests. Much is often at stake in this process and strong opposing views are often held by those involved. Whilst councillors should take account of these views, they should not favour any person, company, group or locality, nor put themselves in a position where they appear to do so. Members who do not feel that they can act in this way should consider whether they are suited to serve on Planning Committee.
- 2.5 Members should also be very cautious about accepting gifts and hospitality. The Code of Conduct requires any members receiving, in their capacity as members, any gift or hospitality over the value of £25.00, to provide written notification of the details to the Monitoring Officer within 28 days of its receipt. Such details go into a register of gifts and hospitality which is open to inspection by the public. The Register of Member Hospitality and Gifts is maintained by the Civic Services Team and is subject to review by the Monitoring Officer.
- 2.6 Similarly, during the course of carrying out their duties, officers may be offered hospitality from people who have an interest in a current or future planning proposal. Wherever possible offers should be declined politely. If the receipt of hospitality is unavoidable, officers should ensure that it is of a minimal level and declare its receipt as soon as possible.

- 2.7 Employees must always act impartially. In order to ensure that senior officers do so, the Local Government and Housing Act 1989 enables restrictions to be imposed on their outside activities, such as membership of political parties and serving on another Council. The Employees' Code of Conduct (which forms part of the Council's Constitution) also requires that staff act impartially.
- 2.8 Paragraphs 3(1) and 3(2)(d) of the Code of Conduct require members to treat others with respect; and not to do anything which compromises or which is likely to compromise the impartiality of those who work for or on behalf of the authority.
- 2.9 Planning legislation and guidance can be complex. Officers will ensure that members receive training on the planning process when they are first appointed to the Planning Committee. Members will also be updated regularly on changes to the legislation and/or procedures. Participation is essential for those members involved in making decisions on planning applications and on local development documents as it equips them to carry out their responsibilities lawfully.

3. Declaration and registration of interests

- 3.1 The Localism Act 2011 and the Code of Conduct place requirements on members regarding the registration and declarations of their interests and the consequences for members' participation in decisions, in light of those interests. Full guidance on personal and prejudicial interests is contained in the published guidance on the Code of Conduct. In addition, advice may be given by the Council's Monitoring Officer. The requirements must be followed scrupulously and members should review their situation regularly as responsibility for fulfilling the requirements rests on individual members at all times.
- 3.2 The provisions of the Code of Conduct attempt to separate out the interests arising from the personal and private interests of the Councillor, from those arising from the Councillor's public life. Members should carefully consider the provisions of the Code if they might have an interest and they should also consider how that interest would be perceived by a member of the public with knowledge of the relevant facts.
- 3.3 The Register of Members' Interests is available for public inspection. It is the responsibility of the Monitoring Officer and is maintained by the Local Democracy Team. A member must provide written details of relevant interests within 28 days of their election or appointment to office. Any changes to those interests must similarly be notified within 28 days of the member becoming aware of such changes.
- 3.4 An interest can either be personal or personal and prejudicial. The Code of Conduct defines these terms. Support and advice on these matters is

also available on request from your Monitoring Officer.

3.5 A prejudicial interest would require withdrawal of the member from the Committee. However, where a member has a prejudicial interest in any business of the authority, s/he may attend a meeting but only for the purpose of making representations, answering questions or giving evidence relating to the business, provided that the public are also allowed to attend the meeting for the same purpose. Members should refer to Section 5 of this guidance if they wish to submit a planning application to their authority.

3.6 If a member with a prejudicial interest speaks at a Committee, they should withdraw after they have spoken. This is to ensure that they do not by their presence, influence, or seek to influence, a Committee during the debate.

3.7 Personal interests will not require withdrawals. Where a member considers they have a personal interest in a matter they must usually declare it, but it does not follow that the personal interest debars the member from participation in the discussion or voting.

4. Predetermination, predisposition or bias

4.1 In addition to declaration of personal and/or prejudicial interests, members of Planning Committee need to avoid any appearance of bias or of having predetermined their views before taking a decision on a planning application. Failure to do so could lead to a legal challenge being taken to overturn the decision, to a complaint to the Local Government Ombudsman or to a complaint that a member has breached the Code of Conduct.

4.2 Members can have a legitimate predisposition in relation to a particular matter but must be careful to avoid predetermining a decision. Whilst members will often form an initial impression of a matter or issue, a distinction is drawn by the courts between a member having clearly expressed an intention to vote in a particular way before a meeting (predetermination) and a predisposition toward an initial view. Predisposition may occur where a member makes it clear that they are willing to listen to all material considerations presented at the Committee before deciding on how to exercise their vote on behalf of the community.

4.3 If the Planning Committee member has been lobbied by friends or others to promote or oppose a planning application, they will need to consider whether they have acquired a personal interest or not. Whether or not it is a personal interest, they need also to consider whether their view is likely to be regarded as predetermined. If they have predetermined their position they should avoid being part of the decision-making body in relation to the relevant planning decision.

- 4.4 A Ward Councillor who is also a member of Planning Committee and wishes to campaign for or against a proposal, may speak at a Planning Committee on behalf of their constituents having declared their predetermined position. A Councillor can continue to represent those ward interests as a spokesperson for their local community, notwithstanding their normal Planning Committee membership. However, in this situation they should declare their position and not take part in the vote to avoid accusations of bias.
- 4.5 Annual training will be held for members on the issues of declaration of interests, predetermination, predisposition and bias as well as on the planning process generally. Members should make every effort to attend training events and should be aware that a record of the attendees is always kept. Members should comply with minimum standards, to be agreed by group leaders, in relation to attendance at Standards and Planning Training events. They should also comply with any system of review and appraisal which the Council implements.
- 4.6 Members should contact the Monitoring Officer at an early stage if they are concerned that they might have predetermined an issue, or that there might be an appearance of bias.

5. Development proposals submitted by members, officers and the council

- 5.1 Planning applications submitted by current or former members, officers and their close friends, and associates, can give rise to suspicions of impropriety, as can proposals submitted by the Council itself.
- 5.2 While the submissions are perfectly legitimate, it is vital for the Council to ensure they are handled in such a way that there are no grounds for accusations of favouritism. The following principles should therefore apply.
- Serving councillors who submit their own proposals to the Council, or act as agents for people pursuing planning matters, should not play any part in the decision-making process for those proposals.
 - The Monitoring Officer should be informed of such proposals when they are submitted.
 - Proposals should be reported to the Planning Committee as main items and not dealt with by the officers under delegated powers.
- 5.3 Consideration of a proposal from a member in these circumstances would normally be considered as a prejudicial interest under the Code of

Conduct and as such the member would be required to withdraw from any consideration of the matter. The Code of Conduct also provides that the member should "not seek improperly to influence a decision about the matter". It is important to emphasize that "improperly" does not imply that a Councillor should have any fewer rights than a member of the public seeking to explain and justify their proposal to an officer in advance of consideration by a Committee.

- 5.4 A member with a prejudicial interest may now address the Committee where members of the public enjoy the same rights. However, the member should consider whether it would be wise to address the Committee in all the circumstances of the case and should consider carefully the nature of the prejudicial interest and his or her relationship, with the remainder of the Planning Committee.
- 5.5 Proposals for a Council's own development should be treated with the same transparency and impartiality as those of private developers.

6. Lobbying

- 6.1 It is accepted that lobbying is a normal and perfectly proper part of the political process. Anyone who may be affected by a planning decision may seek to influence it through an approach to their elected Ward member or to a member of the Planning Committee.
- 6.2 However lobbying can lead to the impartiality and integrity of a member being called into question unless care and commonsense is exercised by all of the parties involved. When being lobbied, councillors (and members of the Planning Committee in particular), should take care about expressing an opinion that may be taken as indicating that they have already made up their mind on an issue before they have been exposed to all the evidence and arguments (see the paragraphs on predetermination above). In discussions with members of the public, councillors should restrict themselves to giving procedural advice about the planning process. They should suggest to those who are lobbying, that they should speak or write to the relevant officer, so that their opinions can be included in the officer's report to the Committee. If members do express an opinion they should make it clear that it is purely provisional and that they will only be in a position to take a final decision after having heard all the relevant evidence and arguments at Committee.
- 6.3 Where a member has a prejudicial interest in any business of the authority s/he may attend the meeting as long as it is purely for the purpose of making representations because the Council's procedures allow for members of the public to attend the meeting for the same purpose.
- 6.4 If that member responds to lobbying by deciding to go public in support

of a particular outcome, or even campaigning actively for it, they will have predetermined their position.

If that member speaks on behalf of a lobby group at the decision-making Committee they should withdraw afterward to avoid any possibility of suggestion that members of the Committee had been influenced by their continuing presence.

- 6.5 Councillors have a responsibility to strike the right balance between a duty to be an active local representative and the requirement, when taking decisions on planning matters, to take account of all arguments in an open-minded way.
- 6.6 When considering planning applications or proposals for inclusion in the local development framework members should bear the following in mind:-
- Political group meetings must not be used to decide how planning committee members should vote on an application at Committee. The use of political whips to seek to influence the outcome of a planning application is likely to be regarded as maladministration by the Local Government Ombudsman.
 - Planning Committee members should, in general, avoid organising support for or against a planning application and must avoid lobbying other members. Such actions can easily be misunderstood by the parties to the application and to the general public.
 - Members should not put improper pressure on officers to make a particular recommendation and should not do anything which comprises, or is likely to compromise, the officers' impartiality. Members must refrain from seeking to influence the outcome of any officer's recommendation or any decision which has been delegated to an Officer.
 - When a member is considering whether he or she should call-in an application for determination by the Committee, they should state clearly in writing the reason for the call-in so there is a record of the decision. Their reasons should refer solely to material planning considerations.

7. Pre-application discussions

- 7.1 Recent Government initiatives have recognised the need to allow and encourage members to be engaged in pre-application discussions on major developments as part of their role as champions of the community. There is a danger however, that involvement in these discussions could lead to accusations of pre-determination when the

subsequent application comes before the Committee for determination. It is important therefore that there is clarity at the outset that any discussions will not bind the Council to make a particular decision and that any views expressed in the process are personal and provisional. To ensure that any advice given is based on the Development Plan and material considerations, officers should be present when councillors are involved in pre-application discussions. Members should avoid giving advice on a Development Plan or material considerations as they may not be aware of all of the issues at an early stage. Officers should deal with any negotiations to ensure that the authority's position is co-ordinated.

- 7.2 A written note should be made of all meetings and the matters discussed should be confirmed in a follow-up note or letter which will be placed on the file as a matter of public record. There may sometimes be a need for confidentiality but this need can be exaggerated and confidentiality of advice by representatives of the public body on a planning matter will rarely be justified even where the applicant's interest is sensitive. If there is a legitimate reason for confidentiality there should be a separate note of the non-confidential issues raised which should be placed on the record in the normal way.
- 7.3 The LGA has produced an up-dated leaflet entitled "Positive Engagement – A Guide for Planning Councillors" (2008) which gives practical advice to planning councillors anticipating involvement in discussions with developers, their constituents and others about planning matters. The text of the leaflet is set out in the appendix to this document and forms part of this Planning Code.
- 7.4 Pre-application discussions should take place only in accordance with the advice in the leaflet and other guidance issued to assist members and officers. Although the term "pre-application" has been used in this Code, the same considerations should apply to any discussions which take place, for example on planning policy documents, before a decision is taken.
- 7.5 Consideration should be given as to when to involve other consultees and members of the community in pre-application discussions on major applications. The procedures followed will depend on the significance and extent of the application proposals and level of public interest. Officers and members should refer to the Statement of Community involvement which sets out guidelines for the pre-application stage of the planning process.
- 7.6 Other mechanisms are available to involve members in pre-application discussions. These include:
- Information reports to Committee on discussions which the officers have carried out. This enables members to identify

items of interest, to seek further information and raise issues for consideration.

- Presentations by developers to Committees.
- Ward member briefings by officers. This enables officers to advise members of the content of initial pre-application meetings held.

8. Officer reports to committees

8.1 The Courts and the Ombudsman have advised that officer reports on planning applications must have regard to the following points:

- They should be accurate and cover the substance of any objections and the views of those consulted.
- Relevant information should include a clear exposition of the Development Plan; site or related history; and any other material considerations.
- They should include a written recommendation of action. Additional oral reporting at the meeting should be avoided except to up-date a report and should be carefully minuted.
- The report should contain technical appraisals which clearly justify a recommendation.
- If the recommendation is contrary to the provisions of the Development Plan, the material considerations which justify the departure must be clearly stated.

8.2 It is particularly important for the report to cover this final point, not only as a matter of good practice but because failure may constitute maladministration 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 to determine applications in accordance with the plan under Section 38A of the Planning and Compensation Act 2004.

9. Public speaking at planning committees

9.1 The rules and procedures on public speaking at Planning Committee are set out in Part 4 of the constitution - Council Procedure Rules. Those speaking should be asked to limit their presentations to the clarification of representations already made in writing to the Council.

9.2 Documents not previously submitted should not normally be circulated to the Committee as all parties may not have had time to react to the

submissions and members may not be able to give proper consideration to them. Also, officers may not be able to provide considered advice on any material considerations arising. This should be made clear to those who intend to speak. The acceptance of circulated material could imply a willingness to take the necessary time to investigate any issues raised and lead to the need to defer the application or risk a complaint about the way a material has been considered. For similar reasons messages passed to members sitting in Planning Committee should be avoided. Care needs to be taken at all times to avoid the appearance of external influence or bias.

10. Decisions contrary to officer recommendation and/or the development plan

- 10.1 As mentioned in Section 8.2 of this Code, the law requires that decisions should be taken in accordance with the development plan unless material considerations indicate otherwise (Section 38A – Planning Compensation Act, 2004). This gives rise to two main issues. Firstly, all applications which are not in accordance with the development plan must be identified and advised as such. Secondly, if it is intended to approve an application which is contrary to the Plan, the material considerations leading to this conclusion must be clearly identified and an explanation given as to how these considerations, justify overriding the Plan. In certain circumstances the application may then have to be referred to the relevant Secretary of State. If the officer's report recommends approval of a departure from the Plan, the justification for this should be included in full in that report.
- 10.2 Where Planning members are predisposed (not predetermined) to make a decision contrary to officers' recommendations they should if possible discuss their views with planning officers before the Planning Committee with a view to forming tentative reasons for their decision. Alternatively the meeting can be adjourned for the reasons to be discussed in detail. If there is a strong objection from the officers regarding the validity of the reasons, members should consider deferring the matter to another meeting for the draft reasons to be tested and discussed. In cases like this a site visit should be arranged.
- 10.3 If the Committee makes a decision contrary to the officer's recommendation (whether for approval or refusal), members should clearly state their reasons and a detailed minute of those reasons will be made and placed on the application file. The reasons given by members should observe the principles of reasonableness and should be based on all relevant information before them (i.e. the material planning considerations) and should not take into account any irrelevant information. In the case of householder applications the minute of the decision will comprise the Council's entire case in the event of an appeal. The planning officers and/or the legal adviser present at the meeting should be given an opportunity to explain the implications of a decision

being taken contrary to the officer's recommendation. Unless the reasons given by the members are reasonable and relevant to the issues in the application, the decision may give rise to a legal challenge.

- 10.4 The Courts have expressed the view that Committees' reasons should be clear and convincing. The personal circumstances of an applicant or any other non-material considerations which might cause local controversy will rarely provide such grounds.

11. Committee Site Visits

- 11.1 In Eastbourne, where most application sites will be known to members and will be readily accessible, the need for deferring an application for a formal site visit to be carried out will rarely be necessary. These site visits can cause delay in the planning process as well as additional costs and should only be used where the expected benefit is substantial. The report on any application will always make it clear that the officers have visited the site and have identified material considerations on behalf of the Council.
- 11.2 If a formal site visit is carried out, the purpose, format and conduct will be clearly established at the outset and should be adhered to throughout the visit. Members should not allow site visits to be triggered by a request from the ward councillor unless the "substantial benefit test" applies.
- 11.3 Site visits should only be necessary if:
- The impact of the proposed development is difficult to visualise from the plans and any supporting material including photographs taken by the officers; or
 - There is good reason why the comments of the applicant and objectors cannot be expressed adequately in writing or the proposal is particularly contentious.
 - Members propose to vote against the Officer's recommendation and it is the view of the Officer that the grounds for doing so are weak and the decision would be likely to be overturned on appeal.
 - Where a large development is likely to be controversial, officers have the discretion to organise a site visit at an early stage in the planning process.
- 11.4 Individual councillors are encouraged to make site visits themselves and should if necessary contact the applicant to advise them prior to any such visits. However, during informal site visits members should take particular care that they follow the relevant provisions of the Code

relating to the lobbying of councillors, pre-determination, bias and so on.

12. Review of Planning Permissions

- 12.1 On an annual basis, arrangements will be made for councillors to review a sample of implemented planning permissions, randomly chosen by councillors, in order that the quality of the decisions can be assessed. The review should include examples from a broad range of categories, such as major and minor development, permitted departures, upheld appeals, allowed appeals on overturns, Listed Building work and enforcement cases.

13. Complaints and Record Keeping

- 13.1 The Council has its own local complaints procedure which is set out separately.
- 13.2 In order that complaints can be fully investigated, record keeping on planning matters will be complete and accurate. Every planning application and enforcement file will contain an accurate account of events throughout its life, including records of all relevant meetings and telephone conversations.
- 13.3 Where a planning application is dealt with under the delegated procedure, a complete record will be kept of the planning considerations, including the objections and other representations taken into account in determining the application.

APPENDIX

Positive Engagement - A Guide for Planning Councillors - LGA guidance

Councillors can involve themselves in discussions with developers, their constituents and others about planning matters. However, difficulties can be avoided if you follow these useful general hints:

Do

- always involve officers and structure discussions with developers
- keep your register of interests up to date
- follow your local authority's planning code
- be aware of what predisposition, predetermination and bias mean in your role – ask your monitoring or planning officer and refer to the Standards Board Occasional Paper on predetermination, predisposition and Bias if unsure
- be aware of what personal and prejudicial interests are – refer to your monitoring officer and the Standards for England website if you are unsure
- recognise the distinction between giving advice and engaging in negotiation and when this is appropriate in your role
- inform officers about any approaches made to you and seek advice
- ask for training from your authority in probity matters
- be prepared to hold discussions with an applicant and your officers before a planning application is made, not just after it has been submitted to your authority
- preface any discussion with disclaimers; keep a note of meetings and calls; and make clear at the outset that discussions are not binding
- stick to policies included in adopted plans, but also pay heed to any other considerations relevant to planning
- familiarise yourself with your authority's Code of Conduct and follow it when you are representing your authority

- use meetings to show leadership and vision
- recognise that you can lobby and campaign but that this may remove you from the decision making process
- feed in both your own and your local community's concerns and issues

Do not

- use your position improperly for personal gain or to advantage your friends or close associates
- attend meetings or be involved in decision-making where you have a prejudicial interest under the Members Code of Conduct - except when speaking when the general public are also allowed to do so
- Accept gifts or hospitality
- Compromise the impartiality of people who work for your authority

- encourage positive outcomes
- be aware that you can engage in discussions but you must have and be seen to have an open mind at the point of decision making
- meet developers alone or put yourself in a position where you appear to favour a person, company or group – even 'friendly' private discussion with a developer could cause others to mistrust your impartiality
- invent local guides on probity in planning which are incompatible with current guidance – look for commonly held and common sense parallels in other authorities or the principles set out in national guidance
- seek to influence officers put pressure on them to support a particular course of action in relation to a planning application
- prejudge or be seen to prejudge an issue if you want to be a decision maker on a proposal