

## **Part C8. PLANNING CODE OF PRACTICE FOR MEMBERS AND OFFICERS**

### **8.1 Purpose of this Code**

- i. This Planning Code of Practice ('the Planning Code') has been prepared to guide Members and officers in the discharge of the City Council's statutory planning functions. This Code will also inform potential developers and the public generally of the high standards of ethical conduct adopted by the Council in the exercise of its planning powers.
- ii. The Planning Code is in addition to Birmingham's adopted Code of Conduct for Members and subject to the responsibilities and requirements as set down by the Monitoring Officer from time to time. The responsibility for declaring an interest rests with individual Members and officers. Members should seek legal advice if they are unsure as to whether they have an interest which may prevent them from taking part in a discussion or vote on a particular planning application. Planning Committee Members must exercise an independent mind on issues before the Committee.
- iii. The provisions of this Planning Code are designed to ensure that planning decisions are taken on proper planning grounds, are applied in a consistent and open manner and that Members and officers making such decisions are held accountable for those decisions. The Planning Code is also designed to assist Members and officers in dealing with approaches from property owners.
- iv. If you have any doubts about the application of this Planning Code, you should seek early advice, preferably well before any meeting takes place, from the Director (Inclusive Growth) and/or the Assistant Director Planning/Assistant Director Development.

### **8.2 Roles and responsibilities**

- i. Members and officers have different but complementary roles in the planning process. Members have more than one role in the process – as Ward Members and as Planning Committee Members.

#### **Ward Members not on the Planning Committee**

- ii. Ward Members who are not on the Planning Committee are in a position to represent the interests of their Ward when it comes to planning and related applications. Ward Members may:
  - Observe virtual meetings of the Planning Committee
  - Submit written representations to the Planning Committee, subject to the provisions in the public participation protocol;
  - consultations on the draft heads of terms for section 106 agreements;

## **Members who are on the Planning Committee**

i. The role of Members who are involved in the planning decision making process is to exercise their judgment properly on the planning application before them – and be seen to do this. In coming to a decision on a planning application Members should make this decision based solely on material planning considerations. Officer reports to the Planning Committee will identify what is regarded as material to a decision and if Members are unclear on what matters may or may not be material to a decision they should seek advice from officers.

ii. Whilst Members must act within the law, the exercise of planning judgment is theirs and theirs alone. The Planning Committee must take into account all relevant ministerial guidance, local plans (and related documents) and the advice of officers. The weight Members attach to the relevant considerations is a matter of their planning judgment and Members should not give weight to non-planning related matters that may be raised by members of the public.

iii. Planning Committee Members often receive correspondence from constituents, applicants and developers asking them to support or oppose a particular proposal. Members should electronically forward a copy of the correspondence to the Director (Inclusive Growth) or Assistant Director Planning/Assistant Director Development or inform them at the Planning Committee if time is short. Merely forwarding the correspondence onto the relevant officer would not prevent the Member being involved in determining the application.

iv. Where Planning Committee Members are involved in pre-application discussions, they should be advised by the appropriate officers of the Council, which should always include a senior planning officer. The involvement of Planning Committee Members in such discussions should be recorded as a written file record of the meeting.

v. Planning Committee Members should not, whether orally or in writing, organise support or opposition to a proposal, lobby other Councillors, act as advocate or put pressure on officers for a particular recommendation.

vi. Members are democratically accountable to their electors and to the wider public on whose behalf they act.

## **Officers**

vii. The Director (Inclusive Growth) or Assistant Director Planning/Assistant Director Development have a dual role in the decision making process:

- Making decisions on the majority of planning applications under delegated powers.

- Making recommendations on planning matters which are determined by Members at Planning Committee. When making such recommendations the function of officers is to support and advise Members, ensure that any decision they make is lawful and identify any possible consequences of taking decisions.

### **8.3 Predetermination and Bias**

i. In making their decisions, Members of the Planning Committee should not be seen to side with either the applicant or the objector/s prior to the hearing of the application when all the relevant facts are known. Members are required to keep an open mind. This is a requirement of the law and a separate guidance note on predetermination and bias to assist Members in complying with this complex area of legislation and case law is set out in Section C8.13 below.

### **8.4 Development Proposals submitted by Members and Employees**

i. Where development proposals are submitted by Members and employees in respect of their own property or land it is particularly important that the Council ensures that such applications are handled in a way that gives no grounds for accusations of favouritism.

ii. Serving Members of Council who submit applications or act as agents should play no part in the decision making process for that application. Further, they should not take part in the processing of the application nor should they lobby employees or officers either directly or indirectly.

iii. Any planning officer who submits an application for their own property or on behalf of a friend or family member will inform the Director (Inclusive Growth) or Assistant Director Planning/Assistant Director Development in writing and such applications will be determined by the Planning Committee.

iv. Officers are required under the Employee Code of Conduct to make a declaration by completing the Register of Interests/Conflict of Interest Form, declaring any matters which may conflict with duties as an employee and their personal interests such as:

- Any financial interest in any planning application;
- Other interest where others may think that a conflict of interest may arise, such as for proposals near their residence.

v. In circumstances where there is a conflict of interest, the officer has no involvement in any part of the decision making process. If there is doubt about any conflict it is better to be cautious and for the officer to have no involvement.

### **8.5 Member contact with applicants and developers**

i. The Government encourages applicants to enter into pre-application discussions. Such discussions are a normal part of the planning process to seek further information and to seek to identify improvements to proposals at an early stage. These discussions and meetings provide an opportunity for the potential applicant to receive advice and information about the policy and technical requirements that must be met and advice on design, on community engagement and other issues which may improve the chances of an application being acceptable to the Local Planning Authority (LPA). However, it should be made clear that any guidance given will not bind the LPA to making a particular decision.

ii. To minimise the prospect of challenges based on predetermination and bias, the guidelines below should be followed:

- It will always be made clear that any information or statements made cannot bind the LPA to making a particular decision.
- Wherever possible, Members should be accompanied by an officer when meeting with applicants.
- Members should refer applicants who approach them for advice to officers.
- A written record of the discussion should be made by the officer.
- Planning Committee Members are free to take part in meetings with potential applicants or their agents but extra care is needed to avoid any perception of predetermination or bias.

## **8.6 Planning Committee meetings**

### **Attendance at meetings**

i. It is important to ensure that Members taking planning decisions are in possession of all the relevant facts, including matters pointed out or that come to light during a site visit by Planning Committee, matters that may have been raised during public speaking and matters that may have been discussed and considered by Planning Committee on earlier occasions. Attendance of Members on all occasions during the application phase, i.e. once the application has been submitted, will not only demonstrate that Members are fully informed but will also ensure that high quality, consistent and sound decisions are made, and that the risks of legal challenge are minimised.

ii. A Planning Committee Member should not vote in relation to any planning application unless he or she has been present in the meeting of the Planning Committee for the whole of the deliberations on that particular application. In the case of a virtual committee meeting that means having listened to the entire presentation and debate relating to a particular application. By taking part in the vote

on a particular item, members will be deemed to have made a declaration to that effect.

iii. In cases where an application has been discussed at Planning Committee on more than one occasion, if a Member has not attended on each occasion during the application phase and wants to take part in the decision on an application, he or she should consider whether or not they are fully appraised of all the facts and relevant information necessary to properly reach a decision. If there is any doubt, legal advice should be sought by the Member concerned.

### **Conduct at meetings**

i. The Chair of the Planning Committee is responsible for the conduct of the meeting in accordance with the relevant Council procedure rules and for the effective delivery of business.

ii. The Planning Committee meetings are open to the public and they are often well attended particularly when there is a contentious application on the agenda. Meetings are also attended by the applicants/agents and/ or other parties supporting an application and/or objectors against an application. It is important to demonstrate that decisions have been made fairly and transparently and in the correct manner. Any debate should be confined to the planning merits of the matter.

iii. A legal officer should always attend meetings of the Planning Committee to ensure the probity and propriety of the planning and decision-making processes.

iv. Where there is any doubt as to the voting or of the actual counting of votes in relation to any particular application, clarification should be immediately sought by the Chair prior to dealing with the next agenda item, and if considered necessary this may include requesting from each Member as to how they have voted, noting this and the Member's name.

### **8.7 Decisions different to the officer recommendation**

i. Decisions on planning applications must be taken in accordance with the Development Plan unless material considerations indicate otherwise. From time to time the Committee may attach different weight to the potential planning considerations and, therefore, take a decision which differs from the officer recommendation.

ii. Where this occurs, Members must be able to give a clear basis and reason for not taking the officer recommendation. It is important to ensure, as far as possible, that any decision made will be capable of surviving a legal challenge or appeal. So in the event that this occurs the Chair will ensure that the following principles are followed:-

- When a planning application has been deferred following a resolution not to accept the officer recommendation, the Chair shall put to the meeting a

proposed statement of why the recommendation is not considered acceptable, which, when agreed by the Committee, will be formally recorded in the minutes.

- In these circumstances, at a subsequent meeting, the Director (Inclusive Growth) or Assistant Director Planning/Assistant Director Development will respond in a further written report the provisional reasons formulated by the Committee for granting or refusing permission. If the Planning Committee is still of the same view, then it shall again consider its reasons for the decision and a summary of those planning reasons shall be given. The reasons will then be recorded in the minutes of the meeting.
- The officer attending the meeting should be given the opportunity to explain the implications of the decision.
- Members should ensure they clearly identify and understand the planning reasons leading to this conclusion. These reasons must be given before the vote and be recorded.

iii. Where an appeal to the Secretary of State is subsequently lodged against a decision which was different to the officer's recommendation, planning officers will act as a professional witness at the inquiry or hearing unless there is reason to suggest that this would prejudice the outcome. However, it should be noted that where the Planning Officer giving evidence is the officer that recommended approval, then their role is that of advocate for the Council's case.

### **8.8 Deferred applications**

i. In some cases, planning applications may come before the Committee on more than one occasion. This is particularly the case with larger schemes where a pre-application presentation and/ or an Issues report (a report which describes the stage a proposal has reached and the main issues involved) is presented to the Planning Committee, or when an application is deferred for a site visit or further information. Where an application is deferred then the reasons for deferral will be clearly stated and minuted.

### **8.9 Public speaking**

During the Covid 19 pandemic only virtual Planning Committee meetings are taking place and during this time all public speaking is suspended. Any ward members or members of the public wishing to make representations to the committee following the publication of an agenda can only do so by the submission of a written statement in accordance with the revised public speaking protocol.

i. Where Members have a disclosable pecuniary interest in the application then they must not submit representations in relation to the application, even as a member of the public, unless they have a dispensation from the Head of Paid Service.

ii. Speakers will only be entitled to address the Committee on one occasion unless otherwise agreed by the Chair of Planning Committee on the grounds that the application has been significantly changed or amended or significant new information has been produced raising new material planning considerations. In these circumstances, speakers will only be able to speak about new matters or the amended details and not about matters which have been previously considered by the Committee.

iii. Speakers should not raise any substantial new information (including correspondence, other documents, photographs or models) at the Planning Committee meeting, as this does not give all parties adequate time to consider and respond to the submissions, and Members of the Committee will not be able to give proper consideration to issues raised in the material.

iv. It is important that members of the public are not permitted to communicate with or pass messages to individual Committee Members as this may give the appearance of partiality.

### **8.10 Site Visits**

During the Covid 19 pandemic only virtual Planning Committee meetings are taking place and during this time members are not able to request that a Planning Committee site visit take place.

### **8.11 Member training**

i. It is important that all Members involved in the planning process are aware of their role in the process and the policy and legal framework in which they operate.

ii. Therefore, Members serving on Planning Committee should participate in, where possible, the following training each year:

- For Members new to the Planning Committee two sessions comprising a governance and conduct session and mid-year update session;
- For experienced Members of the Planning Committee, a single mid-year update session.

iii. A record of attendance for the compulsory training will be maintained by Planning Officers and a list provided to Party Whips and Democratic Services for monitoring.

iv. Other specialised training will be offered, where possible, periodically throughout the year which will enhance and extend Members' knowledge of planning matters. These are not compulsory but will assist Members in carrying out their role on the Planning Committee.

### **8.12 Reviewing and Updating this Guide**

i. The responsibility for reviewing and updating this Planning Code of Good Practice will be undertaken by the Director (Inclusive Growth) or Assistant Director Planning/Assistant Director Development in consultation with a meeting of the Planning Committee on an annual basis. Ad hoc reviews may occur if there are significant changes to be made; again these will be considered by a meeting of the Planning Committee.

### **8.13 Guidance Note on Bias and Predetermination in the Planning Process**

#### **What is Bias and Predetermination?**

i. The law on bias and predetermination (which is a particular form of bias) is part of the general legal obligation on public authorities to act fairly.

ii. Decision makers are entitled to be predisposed to particular views. However, predetermination occurs where someone closes their mind to any other possibility beyond that predisposition, with the effect that they are unable to apply their judgement fully and properly to an issue requiring a decision.

iii. The leading case on local authority bias and predetermination acknowledges the difference between judges sitting judicially and councillors making decisions in a democratic environment. Given the role of councillors, there must be 'clear pointers' before predetermination is established.

#### **Section 25 Localism Act 2011**

iv. Section 25(2) of the Localism Act 2011 provides that a decision maker is not to be taken to have had, or to have appeared to have had, a closed mind when making a decision just because –

a) the decision maker had previously done anything that directly or indirectly indicated what view the decision maker took, or would or might take in relation to a matter, and

b) the matter was relevant to the decision.

v. The section makes it clear that if a councillor has given a view on an issue, this, considered in isolation, does not show that the councillor has a closed mind on that issue. So, the mere fact that a councillor has campaigned on an issue or made public statements about their approach to an item of council business does not prevent that councillor from being able to participate in discussion of that issue and to vote on it.

vi. Having said this, the use of the words 'just because' in section 25 suggest that other factors when combined with statements made etc. can still give rise to accusations of predetermination. This has also been the approach that the courts have taken to this issue. When considering whether predetermination has taken place they will consider all events leading to the decision (and also, where



appropriate, those following the decision) rather than looking at individual events in isolation.

vii. The case law has also made it clear that the words used by particular Members and the interpretation put on those words is of particular importance. So care still needs to be taken when making statements in advance of the determination of planning applications as there is a risk that they can be misinterpreted or taken out of context.

## **Guidance**

viii. With this in mind:-

- It is always advisable to avoid giving the impression that you have made up your mind prior to the decision making meeting and hearing the officer's presentation and any representations made on behalf of the applicant and any objectors.
- It is advisable not to give a view in advance of the decision. If you do comment on a development proposal in advance of the decision, consider using a form of words that makes it clear that you have yet to make up your mind and will only do so at the appropriate time and in the light of the advice and material put before you and having regard to the discussion and debate in the Committee meeting.
- Particular care should be taken where there are chance encounters with objectors to development proposals or in the context of meetings which are not formally minuted. These are situations where the risk of what you say being misrepresented or taken out of context is particularly high.

## **Concluding Comments**

ix. Councillors should avoid giving a view/ making statements in advance of determination of a planning application. If such views are given, these should be declared to the Planning Committee and legal advice should be sought if necessary as to whether that particular Member can continue to be part of the decision-making process. Any views given in advance should avoid giving the impression that you have already made up your mind and that your part in the decision is a foregone conclusion.

## **8.14 Protocol for public speaking at the Planning Committee meetings**

### **Introduction**

i. This Protocol sets out the procedures to allow public speaking at the meetings of the Planning Committee.

ii. Subject to the exceptions below, public speaking does not apply where Members are considering a report for information or where Members are considering detailed reasons for refusal or conditions of approval following a decision of an earlier Committee not to accept the Director (Inclusive Growth) or Assistant Director Planning/Assistant Director Development recommendation. It also does not cover applications subject to non-determination appeals, where Members' views may be sought.

## **Procedures**

### **Pre-application presentations**

iii. Agents or prospective applicants have the opportunity to present their proposals to members of the Planning Committee at presentations organised in accordance with the '**Protocol for Pre-application Presentations to Planning Committee.**'

Matters for determination or other matters requiring a decision

During the Covid 19 pandemic only virtual Planning Committee meetings are taking place and during this time all public speaking is suspended. Any members of the public wishing to make representations to the committee following the publication of an agenda can only do so by the submission of a written statement in accordance with the revised public speaking protocol below.

Any reference to 'speak' refers to written representations and any reference to 'speaker' refers to an individual submitting written representations.

In order for a written submission to equate to three minutes speaking time, the submission shall be no more than 1 side of A4 and be typed on 1.5 line spacing using Arial type face no smaller than 12 font. No drawings, photographs, graphs or any other visual aid will be permitted.

iv. Applicants, supporters and objectors to an application or other form of consent before the Committee for determination or other matter requiring a decision, will normally be allowed to submit written representations to the Committee, subject to the details of the procedure set out herein and on giving notice of their wish to do so to the Director (Inclusive Growth) or Assistant Director Planning/Assistant Director Development by no later than 12 noon on the Friday immediately preceding the Committee. The written submission itself must be emailed to Committee Services by 12 noon on the Monday immediately preceding the Committee.

v. Applicants, supporters or objectors will have the equivalent of a maximum of three minutes to address the Committee

vi. In the event of more than one applicant, supporter or objector wishing to submit written representations, a spokesperson should be nominated who will submit written

representations on behalf of all registered speakers. If there is no spokesperson nominated, the written submission will be equally divided between the registered speakers.

vii. Where an application is recommended for approval, objectors to an application will be heard first.

viii. Where an application is recommended for refusal, the objector will only be allowed to speak if the applicant or supporter has registered their intention to address the Committee, except in circumstances outlined in paragraph xiii.

ix. The applicant, supporter and objectors shall take no further part in the Committee debate.

x. If the applicant or supporters do not speak in relation to an application recommended for refusal the objectors will not normally be invited to speak.

xi. If no objector wishes to speak to an application for approval, the applicant or supporter will not normally be invited to speak.

xii. In the circumstances where the officer's recommendation of approval is not accepted by Committee and the applicant or supporters have not been given an opportunity to speak, they shall be given the opportunity to address the Committee for up to three minutes when detailed reasons for refusal are reported.

xiii. In the circumstances where the officer's recommendation of refusal is not accepted by Committee and the objectors have not been given the opportunity to speak they shall be given an opportunity to address the Committee for up to three minutes when detailed conditions for approval are reported.

xiv. For the avoidance of doubt applicants, supporters or objectors will only be entitled to address the Committee on one occasion unless otherwise agreed by the Chair on the basis that the application has been significantly changed or amended or significant new information has been produced raising new material planning considerations. In these circumstances, speakers should only speak about new matters or the amended details, not about matters which have been previously considered by the Committee.

### **Passing around of information**

xv. The circulation of materials will not normally be accepted during the meeting. Public speaking is an opportunity to highlight important points already made in representations, rather than to introduce new information. Members of the Committee will not be able to give proper consideration of any new issues raised in the material.

### **Members of Planning Committee**

xvi. A Member of the Planning Committee having a disclosable pecuniary interest in an application must either declare that interest or bring it to the attention of the meeting and may not participate in the discussion or vote on the matter and must leave the room.

xvii. In line with the Birmingham Code of Conduct for Members, a Member must declare any interest in an application and complete the Register of Interest/Conflict of Interest Form.

xviii. No Members with a disclosable pecuniary interest (whether they are a member of the Planning Committee or not) are entitled to address the Committee in accordance with the terms of this protocol for public speaking.

### **Review**

xix. This Protocol may be reviewed, revised or revoked by the Director (Inclusive Growth) or Assistant Director Planning/Assistant Director Development in consultation with a meeting of the Planning Committee at any time.

### **Note:**

For the purposes of this code, reference to 'attending' a meeting of the Planning Committee includes reference to attendees being in more than one place including electronic, digital or virtual locations such as internet locations, web addresses or conference call telephone numbers.