

11. PLANNING CODE OF PRACTICE FOR MEMBERS AND OFFICERS

INDEX

PURPOSE OF THIS CODE

DECISION MAKING – REASONS BEFORE VOTE IS PUT

DECISION MAKING - MATERIAL CONSIDERATIONS

Statutory duty and role of plan

Departures from the Development Plan

Other material and non-material considerations

Examples of material planning considerations

Examples of non-material planning considerations

Private interests

BIAS AND PREDETERMINATION IN THE PLANNING PROCESS

What is Bias and Predetermination?

Guidance on Bias and Pre Determination

ROLE OF MEMBERS AND OFFICERS

Members who are on the Planning Committee

Member training

Ward Members not on the Planning Committee

Officers

Advice of Officers

Decisions contrary to officer recommendations

PLANNING COMMITTEE MEETINGS

Attendance at meetings

Conduct at meetings

Publicity for planning applications

LOBBYING, PRE-APPLICATION DISCUSSIONS, AND RESPONDING TO QUERIES FROM APPLICANTS AND OBJECTORS

PROCEDURES TO BE FOLLOWED ON PLANNING SITE VISITS

PLANNING APPLICATIONS SUBMITTED BY MEMBERS AND OFFICERS

11. PLANNING CODE OF PRACTICE FOR MEMBERS AND OFFICERS

PURPOSE OF THIS CODE

This Planning Code of Practice ('the Planning Code') has been prepared in accordance with legislation, case law, both statutory and non-statutory guidance issued by the Secretary of State as well as best practice as recommended by the Planning Advisory Service, such as in the Probity in Planning for Councillors and Officers guidance, and the RTPi Planning Aid Service.

It is to act as a guide to Members and Officers in the discharge of the Walsall Council's statutory planning functions and as such is admissible in any judicial or quasi-judicial proceedings, including Planning Appeals and matters before the Secretary of State. 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.

The Planning Code is in addition to Walsall's adopted Code of Conduct for Members. 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.

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.

DECISION MAKING – REASONS BEFORE MOTION IS PUT

Members should ensure they clearly identify and understand the planning reasons leading to a motion and any conditions to be attached. The law requires that these reasons and conditions must be clearly given **before** the vote is proposed and seconded, with the Chair of the Planning Committee stating the reasons, grounds and conditions that have been put by members of the committee before the vote is put to the committee. If necessary, the Committee should consider adjourning in order to allow time for the wording of the reasons for refusal to be drawn up to enable the vote to be put. Reasons and conditions should not be formulated after a vote has been taken.

DECISION MAKING - MATERIAL CONSIDERATIONS

Statutory duty and role of plan

The development plan is at the heart of the planning system with a requirement set in law that planning decisions must be taken in line with the development plan unless material considerations indicate otherwise (s38(6) Planning and Compulsory Purchase Act 2004). Plans set out a vision and a framework for the future development of the area, addressing needs and opportunities in relation to housing, the economy, community facilities and infrastructure – as well as a basis for

conserving and enhancing the natural and historic environment, mitigating and adapting to climate change, and achieving well designed places. It is essential that plans are in place and kept up to date.

Section 19(1B) - (1E) of the Planning and Compulsory Purchase Act 2004 sets out that each local planning authority must identify their strategic priorities and have policies to address these in their development plan documents (taken as a whole).

The development plan for an area is made up of the combination of strategic policies (which address the priorities for an area) and non-strategic policies (which deal with more detailed matters). Paragraphs 17 to 19 of the National Planning Policy Framework describe the plan-making framework which allows flexibility in the way policies for the development and use of land are produced.

Departures from the Development Plan

Local planning authorities may sometimes decide to grant planning permission for development which departs from a development plan if other material considerations indicate that it should proceed. Significant departures must be notified to the Secretary of State so that he can decide whether he wishes to intervene.

The members of the local planning authority are elected to represent the interests of the whole community in planning matters. But when determining planning applications they must take into account any relevant views on planning matters, whether they are expressed by neighbouring occupiers, local residents or any other third parties, along with all other material considerations. However, local opposition or support for a proposal is not in itself a ground for refusing or granting planning permission, unless that opposition or support is founded upon valid planning reasons which can be substantiated.

Other material and non-material considerations

Material considerations must be genuine planning considerations, i.e. they must be related to the purpose of planning legislation, which is to regulate the development and use of land in the public interest. The considerations must also fairly and reasonably relate to the application concerned.

All the fundamental factors involved in land-use planning are included, such as the number, size, layout, siting, design and external appearance of buildings and the proposed means of access, together with landscaping, impact on the neighbourhood and the availability of infrastructure etc..

The Courts have also held that the Government's statements of planning policy are material considerations that must be taken into account, where relevant, in decisions on planning applications. These policy statements cannot make irrelevant any matter that is a material consideration in a particular case. But, where such statements indicate the weight that should be given to relevant considerations, decision-makers must have proper regard to them. If Members elect not to follow relevant statements of the Government's planning policy they must give clear and convincing reasons prior to the taking of any vote.

If the development plan contains material policies or proposals and there are no other material considerations, the application or appeal should be determined in accordance with the development plan. Where there are other material considerations, the development plan should be the starting point, and the other material considerations weighed in reaching a decision.

Where a proposal is not acceptable, decision-makers should state clearly and precisely the full reasons for refusal.

Examples of material planning considerations

There may be other relevant material considerations that are not on this list (Courtesy of Planning Aid and the Ministry of Housing, Communities and Local Government).

- Local, strategic, national **planning policies** and **policies in the Development Plan**.
- **Evidence based fear of crime: the courts have held that the fear of crime is only a material consideration** where the use, by its very nature, would provide a reasonable evidence backed basis for concern and not just an assertion, conjecture or perception.
- **Emerging new plans or government policies and guidance** which have already been through at least one stage of public consultation
- **Pre-application planning consultation** carried out by, or on behalf of, the applicant
- **Government and Planning Inspectorate requirements** - circulars, orders, statutory instruments, guidance and advice
- **Previous appeal decisions** and planning Inquiry reports
- Principles of **Case Law** held through the Courts
- **Loss of sunlight** (based on Building Research Establishment guidance)
- **Overshadowing/loss of outlook** to the detriment of residential amenity (though not loss of view as such)
- Overlooking and **loss of privacy**
- **Highway issues:** traffic generation, vehicular access, highway safety
- **Noise or disturbance** resulting from proposed use to existing neighbouring properties, including proposed hours of operation
- **Smells and fumes**
- Capacity of **physical infrastructure**, e.g. in the public drainage or water systems
- Deficiencies in **social facilities**, e.g. spaces in schools
- Storage & handling of **hazardous materials** and development of **contaminated land**
- Loss or effect on **trees**
- Adverse impact on **nature conservation** interests & biodiversity opportunities
- Effect on **listed buildings and conservation areas**
- **Incompatible or unacceptable uses**
- Introduction of sensitive use to the detriment of existing users of the locality: **Agent of Change** principle
- Local **financial considerations** offered as a contribution or grant
- **Layout and density of building** design, visual appearance and finishing materials
- Inadequate or inappropriate **landscaping** or means of enclosure

The weight attached to material considerations in reaching a decision is, in most cases*, a matter of judgement for the decision-taker however the decision-taker is required to demonstrate that in reaching that decision that they have considered all relevant matters and applied the correct legal tests.

Generally greater weight should be attached to issues raised which are supported by evidence rather than solely by assertion.

If an identified problem can be dealt with by means of a suitable condition then the Local Planning Authority is required to consider this rather than issuing a refusal.

***Note:** Green Belt sites and proposals which impact upon heritage assets require specific legal tests to be applied and not simply a weighing of material considerations.

Examples of non-material planning considerations

- **Unfounded Fear of crime** i.e. perception or belief of with no actual evidence
- **Matters controlled under building regulations** or other non-planning legislation e.g. structural stability, drainage details, fire precautions, matters covered by licences etc.
- **Private issues between neighbours** e.g. land/boundary disputes, damage to property, private rights of access, covenants, ancient and other rights to light etc.
- **Problems arising during the construction period** e.g. noise, dust, construction vehicles, hours of working (covered by Control of Pollution Acts)
- Opposition to the **principle of development** when this has been settled by an outline planning permission or appeal
- **Applicant's personal circumstances**
- **Previously made objections/representations** regarding another site or earlier application
- **Factual misrepresentation of the proposal**
- Opposition to **business competition**
- **Loss of property value**
- **Loss of view**

Private interests

The planning system does not exist to protect the private interests of one person against the activities of another, although private interests may coincide with the public interest in some cases.

It can be difficult to distinguish between public and private interests, but this may be necessary on occasion. The basic question is not whether owners and occupiers of neighbouring properties would experience financial or other loss from a particular development, but whether the proposal would unacceptably affect amenities and the existing use of land and buildings which ought to be protected in the public interest. Good neighbourliness and fairness are among the yardsticks against which

development proposals can be measured; for example, it might be material to consider the question of "overlooking" or loss of privacy experienced by a particular resident(s).

BIAS AND PREDETERMINATION IN THE PLANNING PROCESS

What is Bias and Predetermination?

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.

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.

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.

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.

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.

The case law has also made it clear that the words used by 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.

Case law also states that:

- a. Where a member holds a disclosable prejudicial interest under the Council's Code of Conduct the member should remove themselves from the meeting and not speak on the matter, and

- b. Where a member holds a non disclosable prejudicial interest or a conflict of interest they should seriously consider whether they should stay in the meeting, speak on the matter or participate in the vote where the fair-minded observer would take into account the interest in deciding whether there was a real possibility of bias.

Guidance on Bias and Pre Determination

With this in mind:-

- 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.
- 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.

ROLE OF MEMBERS AND OFFICERS

Members who are on the Planning Committee

The role of Members who are involved in the planning decision making process is to exercise their judgement 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 the development plan and 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.

Whilst Members must act within the law, the exercise of planning judgement 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 judgement and Members should not give weight to non-planning related matters that may be raised by members of the public.

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 (Planning, Regeneration and Economy) or the Head of Planning and Building Control 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.

Where Planning Committee Members are involved in pre-application or application discussions with applicants, objectors or interested parties, they should always seek advice from the appropriate Officers of the Council, which should always include a Senior or Principal Planning Officer. The involvement of Planning Committee Members in such discussions must be recorded as a written file record of the meeting, and must be kept in the related planning file as part of the planning register. Where such discussions have arisen unexpectedly at a time when no Planning Officers are present or available, Members must report the contact to the relevant planning case officer and a Senior or Principal Planning Officer as soon as possible after the event.

Planning Committee Members must not, whether orally or in writing, organise support or opposition to a proposal, lobby other Councillors, act as advocate or representative for the applicant or objectors, or put pressure on Officers for a particular recommendation.

Members are democratically accountable to their electors and to the wider public on whose behalf they act. Planning decisions must be made solely on the basis of valid planning matters and not by reference to political considerations.

Member training

It is a legal requirement 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.

Therefore, Members serving on Planning Committee must participate in 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, at least a single yearly update session.

A record of attendance for the compulsory training will be maintained by Planning Officers and a list provided to Democratic Services as an official record.

Other specialised training will be offered 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 and may involve changes to legislation and changing laws. Members are strongly advised to attend all training sessions made available to them.

Ward Members not on the Planning Committee

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:

- Attend meetings held in public
- Attend Virtual meetings held in public
- Speak on any matter being considered in public
- Submit written representations to the Planning Committee

Officers

The Head of Planning and Planning Officers have a dual role:

- 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.

Advice of Officers

It is important that elected members receive open and impartial professional advice from their Planning Officers. Elected Members should make planning decisions on the basis of a written Officer's report. Councillors should have good reasons, based on land use planning grounds, if they choose to resist such advice.

Decisions contrary to officer recommendations

When making a decision that is contrary to Officer recommendations the Committee must clearly specify the reasons for doing so and these reasons must be recorded in writing by the committee clerk at the meeting and set out in detail in the minutes. This is because at the heart of any appeal and/or court proceedings will be detailed examination of the Officers' report, its recommendations, and the member's reasons for not following the recommendations of their professional officers. Members should note that in these circumstances they may be required to give evidence in any subsequent appeal or court proceedings.

Before formally making a decision that is contrary to Officer recommendations, the Committee must request Officers to give an opinion on the likely robustness of the proposed reasons for refusal on challenge through appeal. If in the Officers' opinion one or more of the reasons are not or may not be sufficiently robust, the Committee should give serious consideration to omitting the reason or reasons, or (exceptionally) to deferring the decision for a further report. If the Committee wish to maintain such a reason or reasons, then the committee must consider the potential financial implications and the legality of their proposed decision and this should be documented in the minutes of the meeting.

It is conceivable that a Committee will make a decision for reasons which in your Officers' opinion are not sufficiently robust. However it is a matter for the members of the committee to come to their conclusion having considered all the evidence and taking into account all of the material factors, bearing in mind that Members are accountable for their decisions.

PLANNING COMMITTEE MEETINGS

Attendance at meetings

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 or Planning Committee meeting, 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.

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.

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. If a Member considers themselves not to be fully appraised of all the facts and relevant information to properly reach a decision, they may leave the meeting for the hearing of the item, or decline to take part in the vote.

Conduct at meetings

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. The ruling of the Chair at any meeting of the authority on all questions of order and of matters arising in debate, shall be final and shall not be open to discussion.

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.

Prior to the taking of votes, the Chair should:

- clearly identify the motion being made
- where that motion is contrary to the advice of Officers, set out clearly the planning reasons for the motion
- where a motion is to grant, set out any conditions to be attached to a permission and any planning obligations;
- where a motion is to refuse, set out the reasons for refusal.

The law requires that reasons and conditions must be clearly given **before** the vote is put to the committee. If necessary, the Committee should consider adjourning in order to allow time for the wording of the reasons and conditions to be drawn up to enable the vote to be put. Reasons and conditions should not be formulated after a vote has been taken.

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.

Publicity for planning applications

The planning system (allows) for public involvement in the process at every level. All planning applications must be publicised by the local planning authority and registers of all planning applications must be available for public inspection. Local inquiries and hearings into planning appeals and called-in applications are held in public and members of the public have an opportunity to express views on the proposed development. Similarly, when appeals are decided on the basis of written representations, planning authorities notify those who made representations to them about the application and it is open to these parties to express their views in writing.

LOBBYING, PRE-APPLICATION DISCUSSIONS, AND RESPONDING TO QUERIES FROM APPLICANTS AND OBJECTORS

It is recognised that in respect of many aspects of local government and in decision making political views and affiliation have an effect. However, these and other aspects of public behaviour need particular attention when a member is acting, or is likely to have to act, in a quasi-judicial capacity. Members should take into account the following issues:

- 1) The need to ensure that issues are considered on an objective basis according to proper procedures. The need to take into account and judge all relevant material planning factors, exclude from consideration all irrelevant factors and determine each matter on its merits.
- 2) Members may be approached by people interested in achieving a particular outcome to an issue. Clearly Members cannot anticipate such approaches but need to act to preserve their independence and personal integrity. Therefore they should:
 - a) Avoid, so far as possible, meeting such people alone.
 - b) Avoid giving the impression that they have already made up their mind.

- c) Restrict responses to giving procedural advice.
 - d) Direct interested parties, any written representations or petitions to the relevant Officers and inform Officers of the approach so that comments of such persons relevant to the issue in question can be properly reported and taken into account in the decision process.
 - e) Advise individuals that any views expressed are personal and are not those of the actual decision making body.
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- 3) Consider whether it is appropriate for them to subscribe to a petition, present a delegation or otherwise publicly express an opinion about a matter when the Member will be part of the decision making process.
 - 4) Refrain from pressuring Officers to make recommendations in any particular way.

PROCEDURES TO BE FOLLOWED ON PLANNING SITE VISITS

A report must be received by Committee before a site visit can take place.

The purpose of the site visit is to inspect the site and its surroundings to enable proper determination of the application. The reason for the particular site visit must be clearly stated and will be recorded in the minutes by the Clerk at the Committee meeting when it is resolved to inspect the site.

The visit will take place at the earliest possible opportunity to avoid any undue delay in determination of the application. It will always take place prior to the next scheduled meeting of the Committee. A time and date for the inspection will be agreed with the Chairman within three working days of the decision to defer the application. Members should make every effort to attend the site visit, though participation in the discussion at the subsequent meeting of the committee that determines the application is not conditional upon having attended the site visit.

If Committee are unable to visit a site as pre-arranged no decision on the application should be made until the visit has been re-arranged and carried out.

The General Manager planning services will notify those parties whose permission will be required to gain access to the site of the time and date of the inspection. Notification of deferral of decision on the application and the intention to inspect the site will be given by the General Manager, Planning Services to all other interested parties.

No decisions can be made during the site inspection: it is not a formal meeting of the Committee and no debate should take place on site. Members should not express any views on the application to any other parties present.

The visit to each site will aim to commence at the allotted time and no earlier, although unavoidable delays could take place due to traffic congestion. A Planning Officer will accompany Members on the coach or meet members at the site if coach transport is not arranged.

At each site, the planning Officer will summarise the proposals, remind members of the reason for the visit, and point out any features on site of particular relevance. Where the site can be seen from public roads there will be no need to meet any interested party to gain access.

If the site is to be also viewed from adjacent land members should ensure that the inspection arrangements are carried out in full and that all invited parties are present at both the application site and on adjacent land/ property, to avoid any claims of bias.

The role of interested parties at the inspection is to allow access and/ or observe proceedings. Whilst Members may acknowledge interested parties, Members should not make any comments on the application or enter into discussion about issues raised by the application. Members may, however, ask questions of those present to obtain clarification in relation to matters of fact. Members should ensure that they remain together as a group throughout the site visit. They should not allow themselves to be addressed separately from the assembled group.

The Officer attending the site visit will make a note of the visit that will be placed on the planning application file. The note will record

- (a) The date and start/ finish time of the visit;
- (b) Details of those who were informed of the visit
- (c) Those Members, Officers and all other parties present at the visit;
- (d) Any additional information revealed by the visit
- (e) The name of the Officer who prepared the note, and the date of its preparation.

This note will be submitted to the next meeting of the committee so that the outcome of the site visit can be taken into account when determining the planning application.

PLANNING APPLICATIONS SUBMITTED BY MEMBERS AND OFFICERS

The scheme of delegations to Officers on determining planning applications includes a provision that any application that is known to be submitted by or on behalf of any elected member, or any Senior Officer of the Council, or any Officer of Development Management, Planning Policy, Regeneration or Building Control shall be submitted to the relevant Committee for determination.