

# **Members' Planning Code of Practice**

(November 2009)

## **1. Introduction**

- 1.1 This Code of Practice applies to any meeting of the Authority, or, its Executive, committees, sub-committees, joint committees or area committees when considering any Planning matters, including applications or enforcement. All references to 'committee' or 'sub-committee' within this Code will be construed to refer to such meetings.
- 1.2 This Code of Practice has been prepared for all Members who may attend Planning meetings, whether as members of the Planning and Environment Committee or an Area Planning Sub-Committee, or in any other capacity, including making representations to such a committee as a Ward Member, or as an applicant, or an interested party. However, the Code of Practice applies at all times when members are involving themselves in the Planning process and not just at the committee meetings.
- 1.3 The aim of this Code of Practice is to ensure that in the Planning process there are no grounds to suggest that a decision has been in any way biased, partial or ill-founded. It should be applied in accordance with the Member Code of Conduct and, if there is any apparent conflict, the requirements of the Code of Conduct take priority.
- 1.4 If a Member were to behave in a way not compliant with this Code of Practice there could be the possibility of:
  - Putting the Council at risk of proceedings on the legality or maladministration of the related decision; and/or
  - The Member being at risk of an allegation of breach of the Member Code of Conduct.

## **2. Planning Decisions**

- 2.1 Decisions that the Council makes about Planning applications can be quite controversial. Any development is likely to have significant impact on the neighbourhoods where people live and therefore may be subject to close public scrutiny.
- 2.2 Planning decisions can be appealed to the Secretary of State, they can be challenged in the High Court and they can be the subject of a complaint to the Local Government Ombudsman. There is also a risk that Members can be named in a report made to the Standards Committee for breach of this Code. The Barnet Code of Conduct requires Members to avoid any possibility of being influenced by their own personal interests. However, for certain types of decision like Planning and Licensing, the requirements of the Code go further than this. Members are required to act in a quasi judicial role, without reference to their political considerations and taking into account the issues that the law says are relevant to the decision.

### 2.3 When Members are making Planning decisions, they must be:-

- **Open-minded:** a Member must not make up his/her mind until s/he has heard all the relevant evidence, which will not happen until the meeting itself. If Members indicate which way they intend to vote before that, they are disbarring themselves from taking part in the decision.
- **Open and Transparent:** The rules about interests in the Barnet Code of Conduct apply with particular relevance to Members who are making Planning decisions. It is very important that, in relation to each matter, Members consider whether they have an interest which should be explained to the public, or which might prevent them from participating in the committee's deliberations and the decision. A Member must seek advice as soon as s/he thinks that there may be any doubt about this.
- **Reasonable:** Another aspect of the requirement for openness is the requirement on the Council to give clear and accurate reasons for any decision that has been taken. This applies to all decisions, but the need is greatest where permission is refused, or, where an application is approved but either the application appears to be contrary to the Council's policies or an application which appears similar has recently been refused.
- **Impartial:** Most Planning decisions involve applying policies to particular situations. The policies have to be applied impartially without reference to the identity of the individuals concerned. Planning decisions are decisions about the use of land, not the people who own it. The circumstances of the individuals will only be relevant in very exceptional cases. Members 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 be impartial in this way, should consider whether they are best suited to serve on Planning Committees.
- **Consider only the Planning issues:** The law requires Planning decisions to be made on the basis of what the legislation calls 'material considerations'. General issues that are not material Planning considerations and should not be considered may include matters such as:
  - the ownership of the application site;
  - private property rights e.g. rights of way and boundary disputes (such considerations are legal matters on which objectors should consult their solicitors or other advisers since it is not possible for Officers of the Council to advise on such rights);
  - the fact that an applicant has carried out unauthorised development in the past moral objections (such as activities that have the potential become addictive for instance betting shops, amusement arcades etc);

- effects on property and land values; the belief that an application is submitted by an owner with the intention of selling the property at an enhanced value.

2.4 This Code of Practice is supplementary to the Barnet Members' Code of Conduct. It is intended to show how the general principles in the Code should be applied to Planning decisions. A breach of this Code may be a breach of the Members' Code

2.5 This Code of Practice applies equally to independent members of the Standards Committee and co-opted members of Council committees as it does to elected members.

2.6 The Planning system can be challenged in a variety of ways, both formal and informal, and before, during and after committee. This includes in Planning appeals or in courts of law. Therefore Members must bear the contents of this Code in mind through all the stages of the Planning process.

### **3. General Advice**

3.1 The following general advice must be considered by all Members likely to become involved in the Planning process in any way:

- An application relating to a premises in the vicinity where a Member, (or their close associate) lives so that s/he is affected more than the majority of inhabitants of the Ward is likely to involve a **personal and potentially prejudicial interest**.
- A Member being a frequent visitor to the premises in a personal capacity is likely to involve a **personal and a potentially prejudicial interest**.
- A Member belonging to a lobby or campaign group that may be directly impacted by the outcome of an application is likely to have a **personal and potentially prejudicial interest**. (see also section 7 on fettering discretion below)
- A Member having any doubts as to how the Planning Code of Practice applies should seek advice from the Monitoring Officer or his representative as early as possible.
- The Council's Member/Officer Protocols must be abided by at all times.

### **4. Members of the Planning and Environment Committee and Area Planning Sub-committees**

4.1 The role of members of the committee and sub-committee(s) is to make Planning decisions openly, impartially, with sound judgement and for justifiable reasons. This applies equally to policy decisions before the Planning and Environment Committee as it does with applications. Therefore, Members:

- a) Must not make a decision for party political reasons and should avoid any action that may give the perception that this is the case;

- b) Should make themselves familiar with sites and proposals;
- c) May listen to points of view expressed to them but must not, if they wish to be free to debate and vote on an application at committee, commit themselves to support or object to any proposal; since to do so is to prejudge the application in the absence of all the relevant information and advice;
- d) Should listen to the Ward Member if s/he is a member of the Committee, but should not defer to him/her nor give him/her preferential status. (see paragraph 6, below);
- e) Should determine applications in accordance with the advice given to them by their professional Officers unless they have good Planning reasons, in knowledge of all material considerations, to take a different decision.
- f) Who receive correspondence about applications should ensure that copies are made available to the Planning Officers as early as possible;
- g) Must not encourage any member of the public (including but not limited to those speaking at the sub-committee) to communicate with them orally or in writing other than through the sub-committee's procedures;
- h) Must make their decision only after due consideration of all the information and only after the presentation of the application at the sub-committee (or committee) and thus must be present for the duration of the presentation, any oral representations, debate and other deliberations upon an item in order to be able to vote on that item;
- i) Must attend all training relevant to their role as Planning Committee members offered by the Council;
- j) Should not meet with applicants or objectors other than at meetings arranged through the Council. A written record should be kept of any such discussions that take place prior to the meeting of the sub-committee (or committee)
- k) Should, if in any doubt about whether s/he needs to declare an interest, seek the Monitoring Officer's advice as soon as possible and, in any event, prior to the commencement of the sub-committee (or committee) meeting. Noting that:
  - i) The definitions of 'personal' and 'prejudicial' interests in the context of Planning are the same as for all other areas of the Council's work, and, as provided at paragraphs 8 and 10 of the Members' Code of Conduct, contained within the Council's Constitution;
  - ii) A personal interest does not need to be declared at a meeting where the interest arises solely from a body to which the Member was appointed by the Council or another public body, unless and until the Member speaks on the item;
  - iii) A Member should not, if s/he has a personal and prejudicial

- iv) A Member may sit on a sub-committee (or committee) and consider an application if s/he has a **personal interest** which is **not prejudicial**;
- v) As regulatory matters such as Planning are particularly sensitive, it is recommended that Members adopt a particularly cautious approach.

4.2 When declaring an interest at a Planning committee or sub-committee meeting, taking the recommended cautious approach could include considering that:

- a) It is often not enough for a Member to be unbiased, s/he must also be seen to be unbiased;
- b) Connections through any organisation, whether political, charitable, social or otherwise, can create an illusion of bias, even where it does not exist; thus Members who have connections with applicants need to be transparent and quick to reveal them;
- c) It may be prudent to be on one's guard against accusations of bias particularly in the case of applicants and/or agents who might previously have made mischievous or inappropriate applications;
- d) Ultimately, the decision as to whether or not to declare an interest must be the Member's own.

4.3 Equally, other Members should not automatically impute bias merely because an applicant and a Member know one another.

4.4 Decisions on Planning applications can only be made following a full explanation of the material Planning considerations and information on the relevance, e.g. the development plan, national guidance and consultations, at Committee. It follows from this statement of principle that it would not be appropriate for a Member to debate or vote on a matter if s/he has not been present to hear the full presentation and debate on the matter including the Officer update report. If a Member has missed part of the consideration of an item, the Member should abstain when the vote is taken. To avoid Members breaching this guidance inadvertently, the Chairman should be prepared to consider adjourning briefly to allow one or more comfort breaks during meetings.

4.5 There is a duty to give reasons for Planning application determinations at the time the decision is made where the determination is contrary to the Officers recommendation, or, to an objective policy approved for development control purposes, or, that in the opinion of the legal officer is likely to give rise to a liability to pay compensation or an award of costs on appeal. These reasons should be:

- a) Established, defined and described at the time;
- b) Clear and convincing and thus such reasons as "established local need" or "satisfy the personal need" are inadequate;
- c) Rooted in a clear and convincing statement of reasons for departures from policy or the Officers recommendation;

- d) Given with an awareness of the difficulties which will be faced in the future by Officers who will have to explain why they must continue to recommend refusal in circumstances where a similar application has been approved against policy;
- e) Given with an awareness that Members may be asked to appear as a witness for the Local Planning Authority, should an appeal be lodged against the decision and that appeal be heard by way of a Planning Inquiry.

## **5. Members with a personal (and prejudicial) interest**

5.1 If an application is submitted by or on behalf of a Member then s/he must inform the Head of Planning and Development in writing.

5.2 **A Member may exercise a right to speak on his/her own behalf or on behalf of a close associate. Such a Member:**

- a) Is personally affected by an application and has a personal and prejudicial interest. S/he may make written representations to the sub-committee (or committee) and may attend the meeting to make representations, answer questions and give evidence in the same way that the public are allowed to attend the meeting for the same purpose. Unlike the public, such Members must withdraw from the committee room immediately afterwards.
- b) May appoint someone to represent him/her if s/he prefers and are advised that this is often the simplest and therefore the preferable way to proceed;
- c) Must conform to the usual deadlines for representations;
- d) Must not seek or accept, or appear to seek, preferential treatment;

5.3 Any Member who has written formally in respect of a Planning application, either as objector or supporter, is likely to have committed him/herself to refusing or approving the application. Consequently, if a member of the relevant committee or sub-committee, s/he is probably no longer in a position to take the decision because s/he is not seen to be open-minded as the law requires. S/he should leave the room whilst the item in question is before the committee or sub-committee.

5.4 A Member of a committee or sub-committee that is to consider a Planning application, who lives in close proximity to the application site, will have a personal and potentially prejudicial interest to declare. This means that if s/he has such an interest, with or without exercising a right to speak, s/he can not take part in the decision and must declare the interest and leave the meeting room whilst the application is discussed and decided.

## **6. Ward Members**

6.1 Ward Members are inevitably in a difficult position where development is proposed in the locality that they represent. Ward Members are particularly likely to be subject to lobbying by local residents, and to single issue pressure groups. On the other hand, they have been elected to speak for the people in that Ward and they have often canvassed on particular issues which are

relevant to a Planning application. Their opinions therefore are valuable and influential.

- 6.2 Ward Members have a special duty to their constituents, including those who did not vote for them. It is clearly appropriate for Ward Members to listen to a constituent and it is perfectly proper to be influenced by what a constituent has to say but it is not appropriate to “advocate” on behalf of a constituent. That may make a Member seem to be unfair or prejudiced.
- 6.3 Committees and sub-committees should respect the views of the Ward Member but those views should not necessarily prevail; they have to be weighed in the balance with all the other issues.
- 6.4 No form of words could cover every nuance of these situations. Each local Member has to observe an appropriate balance between being an active Ward Member and his/her overriding duty to the whole local community.
- 6.5 Maintaining that balance means that, while a Ward Member may be influenced by the views of the others, it is his/her responsibility alone to decide what view to take on any Planning determination which committee and sub-committee members have to decide on the basis of the statutory Development Plans and other material Planning considerations.
- 6.6 It is those Planning considerations, interpreted in the interest of the whole locality which must be the overriding consideration in debating and determining a Planning application
- 6.7 It is up to the Chairman to decide when any Member (including a Ward Member) should speak but it is not appropriate for a Ward Member to speak both first and last.
- 6.8 A Ward Member not sitting on the committee or sub-committee and members of the public enjoy speaking rights in accordance with the Council’s constitution.

## **7. Avoiding fettering discretion and dealing with lobbying**

- 7.1 Members are frequently approached by applicants and objectors who wish either to ‘lobby’ Members or to ask advice. It is very important that no Member fetters his/her discretion and therefore his/her ability to participate in decision-making by making up his/her mind, or appearing to have done so, prior to the matter’s formal consideration and the hearing of the Officer’s presentation and the evidence and arguments from applicants and interested parties at the meeting.
- 7.2 If a member of a committee or sub-committee is approached by any means by persons wanting to lobby them regarding a Planning application to be heard by that committee then the Member is strongly advised to:
  - a) Explain s/he cannot discuss the matter;
  - b) Refer the person to his/her Ward Member and/or Planning Officer;
  - c) Make and keep a written record of these instances in case the matter

- d) Declare the circumstances of the lobbying at the meeting considering the item;
- e) Pass any correspondence to the Monitoring Officer at the earliest opportunity and encourage the applicant to submit written information to the Planning Officer;
- f) Avoid giving any commitment or impression of a commitment; that s/he holds any particular view about the matter or how s/he will vote;
- g) Where possible, provide information on the Council's general Planning policies and procedures only.

7.3 Members, if they wish to be free to debate and vote on an application, should avoid organising support for or opposition to a Planning matter to be determined by the committee or sub-committee and should not lobby other Members as such actions can easily be misunderstood by parties to the application and by the general public.

7.4 If a Member realises that s/he has fettered his/her discretion by some comment or action then this must be declared and the Member should not take part in the discussion on that item or vote, s/he should withdraw after making their comments. This withdrawal will avoid any suggestion that other members of the committee may have been influenced by his/her continuing presence.

7.5 An important element of the Members' Code of Conduct is the general obligation not to "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." In terms of the Planning process, lobbying of Members can lead to the impartiality and integrity of a Member being called into question. The acceptance of lobbying can cause public mistrust of Local Planning Authorities. Therefore, the actions and conduct of Members should be seen to be appropriate and above suspicion to an impartial outside observer.

7.6 Decisions should be taken in the interests of the Borough as a whole and should not be improperly influenced by, or, in favour of any person, company, group or locality. The key is to demonstrate that each Member's decision was taken on relevant considerations alone.

7.7 No Member should accept any gifts or hospitality from an applicant or objector in a Planning matter. If a degree of hospitality is entirely unavoidable then the Member should ensure it is of a minimum, its acceptance is declared as soon as possible and it must be recorded within 28 days of its receipt in the Member's register of interests if its value is over £25.

7.8 Members and substitute members of Planning committees should discourage applicants or agents from approaching them, should aim to minimise social contacts with known developers or agents, and refrain from such contacts when an application has been submitted.

7.9 A Member will not have fettered his/her discretion by:

- a) Receiving or listening to viewpoints from applicants or objectors;
- b) Making comments to applicants, interested parties, other Members, or

- c) Seeking information through any alternative channel other than Democratic Services;
- d) Simply being a member of a group or organisation that may make representations on a particular matter before a Sub-committee where there is no direct impact on the Member and s/he is not otherwise fettered by any actions or comments made in relation to the group's representations. However the Member should make it clear to both the group or organisation and the committee that s/he has reserved judgement on the matter prior to its consideration at committee or sub-committee.

## 8. Site Visits

- 8.1 As a general principle, Members are encouraged to familiarise themselves with the site and surroundings of Planning applications under consideration by a committee or sub-committee.
- 8.2 **Site visits should normally be pre-arranged and carried out with fellow committee or sub-committee members at an organised date and time. The purpose of the visit is for Members to view the site accompanied by an Officer who will ensure that the issues raised by the application are drawn to the Member's attention**
- 8.3 If site visits are made by individual Members then they should be conducted from the public highway or public open space. If a Member believes that s/he cannot make a site visit without entering into private land and the expected benefit is substantial then s/he should contact the case officer and request a pre-committee site visit or, if the application is already on a committee or sub-committee agenda, propose deferral for a committee or sub-committee site visit at the meeting.
- 8.4 Invitations to Members from applicants/agents or objectors or other groups to visit the sites or surroundings of Planning applications or attend private meetings or briefings should generally be declined unless it is arranged by Officers as an official committee visit/presentation. If a Member does decide to accept such an invitation s/he should advise the Head of Planning and Development well before the visit takes place and take particular care about expressing an opinion that may be taken as indicating that s/he has already made up his/her mind on the issue before s/he has been exposed to all the evidence and arguments. In such situations, s/he should restrict him/herself to giving procedural advice, including advising those who are lobbying that they should write to the case officer, in order that their opinions can be included in the Officer's report to the committee. The public's expectation is that Members taking the decision will take account of all the evidence presented before arriving at a decision and to commit oneself one way or the other before hearing all the arguments makes one vulnerable to an accusation of partiality.

## **9. The Ombudsman**

- 9.1 The Local Government Ombudsman (more properly known as the Commissioner for Local Administration in England) has a variety of powers.
- 9.2 In essence, however, the Ombudsman cannot challenge the decision made by any Planning committee but can challenge the way in which that decision was made. If a committee or sub-committee fails to address a number of issues properly, then the Ombudsman might decide that this amounted to “maladministration.” If the Ombudsman also considers that injustice has been done, he then has a variety of powers to call for a remedy.
- 9.3 However, that does not mean that the Ombudsman has the power to overturn Planning decisions; only the courts of law and Planning Inspectors can do that and only in strictly defined circumstances.
- 9.4 The potential for maladministration, however, concerns the Council’s Monitoring Officer as, amongst other things, this could result in an award of compensation.

## 10. Sources:

This Code follows the following statutory requirements:

- The Local Authorities (Model Code of Conduct) Order 2007
- LGA (2002) Probity in Planning (Update)
- The Relevant Authorities (General Principles) Order 2001

and draws on the following guidance:

- LGA – Probity in Planning – May 2009
- The Code of Conduct: Guide for Members – May 2007
- DCLG Report: Councillor Involvement in Planning Decisions – January 2007
- AcSES Press Release: Flawed DCLG Report on Councillor Involvement in Planning Decisions – February 2007
- Cleaner, Greener, Transport and Development Overview and Scrutiny Committee Report: The Quality of Planning Decisions made at Planning Committees Review
- LGA(2005) Member Engagement in Planning Matters
- AcSES Guidance model
- Positive Engagement: A guide for Planning Councillors (2005)
- Connecting Councillors with Strategic Planning Applications