

ADVICE FOR COUNCILLORS DEALING WITH PLANNING MATTERS

BACKGROUND

Introduction

1. The planning system is important as a means of protecting and enhancing the environmental quality of our towns, cities and rural areas. The system balances competing demands, which can sometimes be in conflict, to make sure that land is used and developed in the interests of the whole community. It also provides a forum for public information, involvement and debate.
2. All councillors will have contact with planning issues. They may become involved in local cases as ward representatives or may be involved in a decision making committee. Councillors should ensure that all development decisions are properly taken and that everyone involved in the planning process is dealt with fairly, justly and openly. Councillors are being asked to make planning decisions for the whole community. These decisions will result in changes in the physical nature of their communities that will need to stand the test of time.
3. The aim of this Advice is to provide a framework for councillors which will help to establish a consistent approach to issues such as relationships with developers, advice to constituents, planning agreements, lobbying, registration of interests and the conduct of site visits. It should be remembered that interpretation of the law is ultimately for the courts and not for this document.

Development of the Advice

4. In July 1997 the Committee on Standards in Public Life (Nolan Committee) published *Standards of Conduct in Local Government in England, Scotland and Wales*. Recommendation 35 said that "Planning committees should consider whether their procedures are in accordance with best practice, and adapt their procedures, if necessary, setting them out in a code available to councillors, council staff and members of the public." In the *New Ethical Framework for Local Government in Scotland*, published in 1998, the then Scottish Office stated that the content of such codes should be a matter for local authorities. In a speech to the Royal Town Planning Institute (RTPI) in November 1999, Sarah Boyack, as Minister for Transport and the Environment, emphasised the importance of a consistent approach. As a result COSLA, the Scottish Society of Directors of Planning (SSDP) and the Scottish Executive have developed this Advice to assist councillors.
5. In November 1999 the Executive issued a consultation paper *Standards in Public Life* which set out proposals on the introduction of a new framework for ethical standards in public life in Scotland. The cornerstone of the new ethical framework is new codes setting out the principles and rules governing councillors and members of relevant public bodies. This Advice for planning has been developed separately from the general code of conduct for councillors which is being produced under the Ethical Standards in Public Life Etc (Scotland) Act 2000 but is informed by the same ethical considerations. The contents of the Advice will be reviewed in the light of the general code when it is available to ensure consistency.

6. This Advice is intended to apply to all elected members who become involved in planning issues. Councils may have different ways of managing the planning process. For simplicity the term “planning committee” is used, but the Advice applies equally to other bodies such as cabinet, scrutiny committee, planning sub-committee and full council. The Advice applies to all aspects of the planning process ranging from decisions on development plans through to decisions on enforcement action.

7. This Advice is not legally binding on councillors. However, following it should reduce the risk of planning decisions being legally challenged. Councillors should avoid actual impropriety, and at all times avoid any suspicion and appearance of improper conduct. Councillors should also follow the guidance and advice found in the current code of local government conduct¹.

GENERAL ISSUES

Training

8. The general principle under which the planning system operates in Scotland is that decisions should be taken at the most local administrative level unless there are strong reasons for taking them at a higher level. This means that councillors have a vital role to play in the planning process.

9. To do this effectively, councillors should receive appropriate training in planning. Recommendation 34 of the 1997 Nolan Committee report said that "All members of an authority's planning committee (or equivalent) should receive training in the planning system before serving on the committee, or as soon as possible after their appointment." The Scottish Executive, COSLA, the SSDP and the RTPi have produced a booklet *A Guide to Training in Planning for Councillors*. The booklet gives guidance on topics to cover in councillor training and recommends modules on such topics as an overview of the planning system, ethical standards, development planning and determining planning applications. The booklet goes further than the Nolan recommendation by saying that all councillors should receive training. All councillors should therefore ensure that they have training appropriate to their role in the planning process. Councils may wish to set minimum standards in terms of training attended to ensure that those councillors sitting on their planning committees undertake an adequate level of training.

Registration of interests

10. The public has a right to expect councillors to act in a transparent and open manner, particularly in respect of actual or potential conflicts. Councillors should ensure that they follow the advice and guidance on doing so set out in the current code of local government conduct.

11. Recommendations

- Councillors should ensure that their entry in the council's register of members' interests (personal, business, financial etc.) is kept up to date.

¹ SDD Circular11/90 The National Code of Local Government Conduct is to be superseded following the introduction of a new code of conduct as outlined in the Ethical Standards in Public Life Etc (Scotland) Act 2000.

- Councillors who have any interests, property or otherwise, which would prevent them from voting on a regular basis should consider whether they should sit on the planning committee.
- The responsibility for declaring any relevant interest lies with the individual councillor. The test for deciding whether such an interest should be disclosed is whether a member of the public, knowing all the facts, would reasonably think that the councillor might be influenced by it.
- Where councillors are unsure whether an interest should be declared, they should seek the advice of the council's appropriate senior officer. However, the final decision rests with the councillor.
- Any interests relating to a specific item being discussed at committee should be declared verbally before the item is discussed.
- Councillors should not use their position to further a private or personal interest, rather than the general public interest, or give grounds for suspicion of such action. This interest should be declared. The councillor should not take any further part in the decision-making process. In particular any councillor declaring an interest should leave the meeting room and should not return until a decision has been taken on the matter giving rise to the declaration of interest.

THE DEVELOPMENT PROCESS

Pre-application discussions

12. Pre-application meetings between applicants and planning officers are a valuable way for both parties to gain useful information. Where councillors are involved, it is important that the councillor obtains information on those present at the meeting and whom they represent. Details about who was there, what was said and the outcome of the meeting should be recorded by the planning or other officer(s) present. This should be agreed with the councillor and applicant at the start of the meeting.

13. Where there are discussions between applicants/objectors and councillors prior to any formal application, it should be made clear that any views expressed by councillors are personal and provisional and will not bind the council to making a particular decision. This should not stop councillors from providing procedural advice or referring people to the appropriate official. The procedures for recording the details of meetings as set out in paragraph 12 should also be followed.

14. Councillors should avoid pre-judging any matter that may come before the planning committee. All the necessary information will be available before a decision is taken. Councillors, especially those on planning committees, should also be wary of making public statements about a pending application. This will ensure that they do not appear to be pre-judging a decision that will be made by the planning committee. Prejudicial statements by councillors could lead to claims of maladministration being upheld. Any councillors who make such a statement should consider whether they are able to make an impartial decision. If not, the councillor should declare an interest and not take part in the decision-making process.

Lobbying of councillors during consideration

15. Applicants, supporters of and objectors to planning decisions have an interest in ensuring that councillors hear their case. Whilst lobbying is a normal and perfectly proper part

of the democratic process, councillors, especially those on the planning committee, should not respond in such a way as to give grounds to doubt their impartiality.

16. Recommendations

- Councillors should simply listen to a point of view about a planning proposal. Where required, councillors should provide procedural advice to members of the public who do not have a professional representative or indicate where such advice is available within the council.
- Those wishing to lobby councillors should be advised of the existence of this Advice and provided with a copy, if appropriate.
- Those wishing to lobby councillors should be advised that any verbal or written material provided to the councillor in relation to the planning decision will not be treated in confidence. If such material is kept in confidence until the last minute, it will prejudice full and open discussion, leaving officers little or no time to provide proper advice. Councillors should keep a log of such approaches, including telephone calls, which are not of a routine constituency nature. Lobbyists should also be invited to write to the planning authority setting out their views.
- Where potential applicants wish to present their case to a number of councillors at the pre-application or pre-decision stage, any such presentation: should be on the council's premises; should be open to all councillors; should be for the purpose of presenting factual information and not for the discussion of the merits of the case; and objectors or potential objectors should be allowed the same opportunity to give such a presentation. Any request for such a presentation should be submitted to the appropriate council officer.
- Councillors should not indicate or imply their support or opposition to a proposal or declare their voting intention before the planning committee meeting. Any councillor expressing an opinion in this way may risk disqualification from taking part in the final decision.
- Those wishing to lobby councillors should be advised that councillors, especially those on the planning committee, will not decide on the merits of a particular proposal until all information is available and has been duly considered at the committee meeting.
- Political group meetings prior to the meeting of the planning committee or full council should not be used to decide how councillors vote.
- Gifts, hospitality or favours either personal or to the council/community, should be treated with extreme caution. The offer or receipt of gifts, hospitality or favours should always be reported to the appropriate senior officer of the council. The existence of such hospitality should be divulged if the councillor takes any part in a planning decision. The Chief Executive should maintain a register recording the receipt of gifts or hospitality.
- Chairs of planning committees should treat both applicants and objectors alike, should they wish to address the planning committee. Councils may wish to set down procedures in relation to this matter and advise themselves of the guidance contained in *Code of Openness in Local Government* issued by COSLA in November 1996.

- Councillors should ensure that the local authority has clear procedures for handling correspondence received "late" i.e. after the agenda and associated papers have been issued. Applicants and objectors should be told that these procedures are agreed and will be followed subject to the interests of a fair hearing.

Lobbying by councillors

17. Recommendations

- Councillors act as representatives of public opinion in their communities. However, councillors, especially those on the planning committee, should not organise support or opposition, lobby other councillors or act as an advocate to promote a particular outcome.
- Officials are often professional officers. Such officers have to comply with Codes of Conduct or guidelines issued by relevant professional bodies (see paragraph 29 below). Councillors should not put pressure on planning officers to provide a particular recommendation.
- Where councillors on the planning committee feel that they cannot remain impartial but wish openly to advocate a particular course of action on behalf of their constituents, they should declare an interest and not take part in the decision. They may then seek to address the committee on the same basis as that of a ward member, subject to there being appropriate provision for this.

Proposals submitted by councillors or the local authority

18. Where serving and former councillors and their close friends and relatives submit proposals, the proposals should be treated in such a way as to give no grounds for accusations of favouritism.

19. Recommendations

- Serving councillors should not act on behalf of people pursuing a planning matter with the council.
- When making a planning application for their own property, councillors should not take any further part in the development control process following submission of the planning application.
- Planning applications submitted by serving councillors should not be delegated to officers.

20. There are circumstances where the local authority has a direct interest in a development, for example where the authority owns the land, or is acting as the developer. In this situation too the proposals should be treated in such a way as to give no grounds for accusations of favouritism.

21. Recommendations

- Where the local authority has an interest in the development, councillors should ensure that the correct procedures, outlined in SODD Circular 4/1997 - *Notification of Planning Applications*, are followed.

- Where the local authority is acting as the developer, councillors should ensure that the correct procedures, outlined in the Town and Country Planning (Development by Planning Authorities) (Scotland) Regulations 1981, are followed.
- Where the development is a Public Private Partnership / Private Finance Initiative involving the local authority, councillors should be guided by current Scottish Executive advice contained in PAN 55: *The Private Finance Initiative and the Planning Process*.
- Councillors should look to officers for guidance on the requirements of these procedures.

Site visits

22. Site visits are a valuable way for members of a planning committee to gain extra information on a site and its surrounding area. However, they should not be used as a means of delaying a decision or as a covert method of additional lobbying but should be seen as an extension of the committee meeting. Councillors should look to their authority to provide suitable guidance on the circumstances where site visits are appropriate and how they should be conducted. The guidance should address matters such as the number of councillors who should attend, whether applicants and/or objectors should be present, whether they are allowed to speak and issues which it is appropriate to raise.

DECISIONS

23. Decisions must be made in line with section 25 of the Town and Country Planning (Scotland) Act 1997 which states that "where, in making any determination under the planning Acts, regard is to be had to the development plan, the determination shall be made in accordance with the plan unless material considerations indicate otherwise". Councillors should look to National Planning Policy Guideline (NPPG) 1 (revised 2000): *The Planning System*, paragraphs 44 – 58, for further information and guidance.

24. In general, councillors represent the interests of the local community as a whole rather than that of individuals in planning matters.

25. It is important that all those who take part in the planning process feel that their views have been considered. On 2 October 2000, the Human Rights Act 1998 came into force and made it unlawful for local authorities to breach the European Convention on Human Rights (ECHR), unless an Act of Parliament means that they could not have acted differently. The actions of planning authorities may be challenged if they contravene relevant provisions of the Convention. Councillors may wish to note the guidance to local authorities issued in *A new Era of Rights and Responsibilities: Core Guidance for Public Authorities* by the Scottish Executive in February 2000 and *Acting on Human Rights: A Guide for Scottish Local Authorities* issued by COSLA in March 2000. *Human Rights in Scotland: The European Convention on Human Rights, the Scotland Act and the Human Rights Act* is also available electronically on the Scottish Executive website at www.scotland.gov.uk.

26. Where there may be grounds for a claim of maladministration against the planning authority in relation to the planning process, the matter may be referred to the Local Government Ombudsman.

27. An applicant who has been conditionally granted or refused planning permission has a right of appeal to the Scottish Ministers. If the appeal is successful and it is shown that the planning authority has dealt with the matter unreasonably, then the costs of the appeal can be awarded against the council. Current guidance is available to councillors within SDD Circular

6/1990: *Award of Expenses in Appeals and other Planning Proceedings and in Compulsory Purchase Order Inquiries.*

Decisions against officers' advice or contrary to the development plan

28. Where councillors make decisions against, or amending, the recommendations of an officer's report, or where the decision is contrary to policies in the development plan, a detailed minute must be produced which explains the material considerations affecting, and rationale behind, the decision. Further information can be found in Circular SODD 10/1996. Good practice is set out in PAN 41(revised 1997): *Development Plan Departures*. Councillors are reminded of the status of the development plan in terms of section 25 of the 1997 Act (paragraph 23 refers).

29. Where decisions are against the recommendations in an officer's report and there is an appeal against the local authority's decision, then councillors should be aware that officers may be unable to defend that decision at appeal.

30. Where councillors appear as witnesses for the local authority at any subsequent inquiry, they should ensure that the views they express are those of the planning authority.

Planning Agreements

31. Councillors should ensure that, when making a decision on a planning application, the planning authority should not use an applicant's need for planning permission to obtain a benefit which is unrelated in nature, scale or kind to the proposed development. The presence or absence of unrelated inducements or benefits should not influence the planning authority's decision. Where possible planning authorities should rely on planning conditions rather than use a planning agreement. Further guidance is available in SODD Circular 12/1996. Where a councillor has an interest in the outcome of a planning committee decision on a planning agreement, he/she should declare that interest and not take part in the decision.

ENFORCEMENT ACTION

32. It is vital to ensure that, where enforcement action is being considered against either serving or former councillors or their close friends and relatives or against a business in which they have an interest, it is handled in such a way as to give no grounds for the accusation of favouritism. Where a councillor has an interest in the outcome of a planning committee decision on enforcement action, he/she should disclose that interest and not take part in the decision.

33. Councillors should not organise support or opposition, lobby other councillors, act as an advocate or put pressure on planning officers to take inappropriate enforcement action. Councillors are reminded that the failure to consider taking enforcement action against a breach of planning control could be subject to a referral to the Local Government Ombudsman. Councillors should look to officers for guidance on the provisions contained in the relevant circular SODD 4/1999: *Planning Enforcement*.

POST DECISION REPRESENTATIONS

34. Applicants aggrieved by the decision of the planning authority to refuse planning permission or to grant permission subject to conditions have a right of appeal to the Scottish Ministers within six months of the date of the decision notice. They may also appeal to the Scottish Ministers if the planning authority has failed to make a decision within two months (or four months if an environmental statement is required).

35. Following any such decision, councillors are free to comment as they see fit. However, where an appeal is, or is likely to be, made, councillors should consider the potential implications of any public statements or their public support for any campaign concerning the planning decision, especially where their view contradicts that of the planning committee.

REVIEWS

36. Defining the quality of outcomes in Development Plans, Development Control and Enforcement is a difficult process. The Scottish Executive is looking to local authorities to review a selection of their decisions once the development has been completed. This is in order to assess the quality of decisions and to improve the quality and consistency of planning decisions. Members of planning committees should ensure that they take a full and active part in the review process.

37. As outlined in NPPG 1 (Revised 2000), paragraph 65, any local authority experiencing high rates of sustained appeals should examine possible reasons for this, including the continuing relevance of the policy framework on which their decisions have been based. Members of planning committees should ensure that they take a full and active part in the review process.

COMPLAINTS, THE LOCAL GOVERNMENT OMBUDSMAN AND THE COURTS

38. Complaints about the administration of the planning system should be dealt with efficiently and effectively. Councils should have provisions in place to deal with, and record, complaints.

39. Complaints of injustice arising from alleged maladministration by planning authorities may be referred to the Local Government Ombudsman. Examples of maladministration include the provision of inaccurate or misleading advice, breaches of statutory procedure and the absence of articulated reasons for decisions.

40. Alternatively if parties consider that the law has not been properly complied with, they may petition the Court of Session for Judicial Review of the council's action or its failure to act.