

Report of the Monitoring Officer

Local and Neighbourhood Planning – Standards Issues

1. Summary

- 1.1 This report starts to identify potential ethical standards issues which may arise during the process of agreeing local and neighbourhood plans. It is intended to prompt debate on the issue with a view to considering whether further guidance should be offered to Councillors involved in these processes and to determine whether the Committee should do more to promote high ethical standards in relation to this matter.

2. Background

- 2.1 Substantial guidance is available both locally and nationally for Members involved in determining planning applications as to ethical considerations they need to consider. That is not the case for Members involved in preparing local and neighbourhood plans. The changes to the ethical framework brought about by the Localism Act make this a more complex subject as does the introduction of neighbourhood planning arrangements.
- 2.2 The City Council as the local planning authority is responsible for preparing a local plan which sets out planning policies for the area. Such plans set out how the area will develop over time, allocating land for development and setting out policies on what will and will not be permitted and where. These plans go through a process of agreement within the Council before being independently examined by an inspector appointed by the Secretary of State.
- 2.3 Neighbourhood plans can be taken forward by Town and Parish Councils or “Neighbourhood Forums” which are community groups designated to pursue neighbourhood planning in areas

without a Town or Parish Council. They sit within the strategic context of the local plan and establish general planning policies for a neighbourhood. Neighbourhood planning can also be used to produce neighbourhood development orders which permit development without the need for a planning application. Neighbourhood plans and development orders can only be implemented with majority support expressed through a local referendum.

3. Disclosable Pecuniary Interests

- 3.1 The Localism Act 2011 introduced requirements for all Councillors to register their disclosable pecuniary interests and those of their spouse, civil partner or person with whom they are living as if they were spouse or civil partners. These interests are defined in regulations and include beneficial interests in land, licenses to occupy land and tenancies between the Council and certain bodies in which the Councillor has an interest – such as companies of which he or she is a Director.
- 3.2 While the requirement to register a disclosable pecuniary interest is quite straightforward Councillors are aware that the requirements in the Act to declare interests at meetings and to withdraw from those meetings are less so.
- 3.3 The Act says, in summary, that where a Councillor is present at a meeting of the Council or a committee and the Councillor has a disclosable pecuniary interest in any matter to be or being considered at the meeting then the Councillor must not participate in the discussion or the vote.
- 3.4 The prevailing wisdom supported by the guide produced by the Department of Communities and Local Government is that phrase “has a disclosable pecuniary interest in any matter....” should be interpreted as “has a disclosable pecuniary interest **relating to** any matter to be or being considered etc.....”.
- 3.5 The question then is when will an interest in land relate to the local or neighbourhood plan? Unlike with the previous statutory regime the disclosable pecuniary interests provisions do not contain any specific provision excluding interests which apply generally to all or a majority of residents of an area. Nor does the Localism Act allow for any judgment of the significance of an

interest allowing a Councillor with an insignificant interest to declare it and then participate.

4. Disclosable Pecuniary Interests and the local plan

4.1 The local plan will cover the entire City and will amongst other things contain design considerations against which any future planning application will be judged. It could be argued that everyone who owns land in the City and who might want to make a planning application or might be affected by their neighbour's application therefore has a disclosable pecuniary interest relating to the plan. This is clearly not what the law was intended to cover although Parliamentary and Ministerial intent does not always translate into the law.

4.2 Some assistance may be obtained from the guide produced by the Department of Communities and Local Government in relation to setting the Council tax which says:

“If you are a homeowner or tenant in the area of your council you will have registered, in accordance with the national rules, that beneficial interest in land. However, this disclosable pecuniary interest is not a disclosable pecuniary interest in the matter of setting the council tax or precept since decisions on the council tax or precept do not materially affect your interest in the land. For example, it does not materially affect the value of your home, your prospects of selling that home, or how you might use or enjoy that land.”

4.3 The Act (in contrast to the former Code) does not actually include any provisions relating to the materiality of interests. However, Councillors ought to be able to rely on this clear Ministerial statement and it is difficult to conceive of the Director of Public Prosecutions authorising action against a Councillor who relies on it. While the statement relates specifically to council tax the only basis for it being made is that, in the Minister's view, an interest must be material to prevent a Member participating. That principle must be taken to apply equally to other decisions affecting the entire Council area.

4.4 In general, the plan will not materially affect a Councillor's interests and it seems unlikely that he or she will be taken to have a disclosable pecuniary interest in it. This is the advice

which the Monitoring Officer has already given to City Council Members. It is suggested though that there will be exceptions.

- 4.5 The most obvious exception is where a Councillor owns land which is earmarked for development in the plan. In such a situation it is suggested that the Councillor must regard him or herself as having a disclosable pecuniary interest.
- 4.6 Another exception may be where the Councillor owns land which is not currently earmarked but which might reasonably come forward. This again, it is suggested, ought to be treated as a disclosable pecuniary interest.
- 4.7 Members should also be aware of the need to consider land owned not by them but by another body in which they have a disclosable pecuniary interest. The first prosecution brought under the Localism Act which is due to come to trial later this year relates to a Councillor's interest as a Director of the commercial arm of a Housing Association and includes an allegation that he failed to declare an interest in a meeting where the core strategy was under debate.
- 4.8 A more difficult scenario is where the land earmarked for development neighbours land owned by the Councillor. There are those who argue that development on a neighbour's land might *affect* a Councillor's property but does not *relate* to it and so is not a disclosable pecuniary interest. It is unhelpful that this issue is open for debate. It is suggested though that if a change in planning status of a neighbour's land affects the value of a Councillor's land then the Councillor should not normally participate in the decision without a dispensation.

5. Disclosable pecuniary interests and neighbourhood planning

- 5.1 At a neighbourhood level, while the principles are the same, the issues are perhaps more polarised. Most Parish Councillors live in their Parish. They are smaller geographical areas and development proposals are therefore more likely to materially impact on individual Councillors. The "neighbouring land" scenario is also more likely to arise.
- 5.2 An additional difficulty for Parish Councillors is that Parish Councils have fewer Members than the City Council. In a larger Council relatively few decisions are taken by all Members

collectively and it can be more straightforward to ensure that those Members who may find they have an ethical standards difficulty are less engaged in the detailed development of the plan. That may not be possible in a Parish Council.

6. Interests under the Codes of Conduct

- 6.1 The code of conduct adopted by the City Council and the model code upon which the Town and Parish Councils is based contain similar though not identically worded provisions which plug some gaps left by the Localism Act.
- 6.2 The City Council's code includes a provision that where business relates to or is likely to affect the Councillor then the Councillor has an interest which must be declared and, if considered to be prejudicial, requires the Member to withdraw from the meeting.
- 6.3 The scenario described in paragraph 4.8 of a neighbour's land being earmarked for development would certainly fall to be considered under this provision if not covered by the Localism Act.
- 6.4 This provision also covers more than just financial interests. Matters which affect a Councillor's well being also fall to be considered under this provision.
- 6.5 No similar provision appears in the Parish and Town Council code but, like the City's code, the Parish code does have a general prohibition on seeking to improperly confer an advantage on an individual. That provision could easily come into play in this context.
- 6.6 The Localism Act does not deal with the situation where a friend, relative or close associate may benefit from the way land is allocated in a plan. Both the City and Parish Councils codes address this gap.

7. Dispensations

- 7.1 Both the Act and the codes make provision to grant dispensations to allow Members to participate notwithstanding that they have an interest. In the case of the City Council the power to grant dispensations rests with the Standards Committee in some cases and with the Monitoring Officer in

others. Parish and Town Councils make their own arrangements. The grounds for giving a dispensation are set out in the Localism Act and include a catch all that: “it is otherwise appropriate to grant a dispensation”.

7.2 The extent of any dispensation is a matter for the body granting it. It would, for example, be possible to grant a dispensation allowing a Member to speak and vote on the adoption of a plan as a whole but not to participate in any specific discussion relating to his or her land.

7.3 Clearly it makes sense for Councils to have considered how dispensations will be granted before they need to do so. One option would be for the Standards Committee to offer to consider dispensations applications on behalf of Parish Councils. This could be achieved by a joint arrangement between the Parish and City Councils under which the Parish Council delegated decision making responsibilities to the City Council.

8. Bias and Predetermination

8.1 As Members know the case law on this issue took several twists and turns before reaching a conclusion that predisposition was acceptable but predetermination was not. The Localism Act 2011 then enacted a provision which applies if there is an issue about the validity of a decision, and it is relevant to that issue whether a Member had, or appeared to have, a closed mind (to any extent) when making the decision. In such a case:

“A decision-maker is not to be taken to have had, or to have appeared to have had, a closed mind when making the 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.”

8.2 Recent case law has resulted in conclusions that not every Member may be comfortable with. In a case last year relating to Lichfield B.C’s local plan the Chair of the Planning Committee sent an e-mail stating:

“Hello all, this is to remind group members who attended the last group meeting and inform those who did not, that the group decided in government parlance to have a three line whip in place at the council meeting on Tuesday. In plain terms group members either vote in favour of the report I will be giving regarding the local plan or abstain. Also if you are approached by anyone promoting alternative sites, please make no comment. If group members are reported making negative comments it would without any doubt derail our local plan. Sorry if you find this a little heavy handed but there is an awful lot at stake. Have a kind weekend. Kind regards, Ian.”

8.3 The Court rejected the claim of predetermination saying:

“[The statutory wording] refers to a decision-maker having previously done “anything” in relation to a matter that was relevant to the decision. That would, in my judgment, cover the sending of the e-mail. It was something done prior to the meeting which was relevant to the decision in that it was exhorting the recipients to vote in a particular manner. It comes within the description of doing “anything” which is the statutory wording. In my judgment the indication of the view expressed in the e-mail would not be something that would amount to predetermination.

In any event, despite Mr Crean's submissions, I do not find that the tenor of the e-mail was so strident as to remove the discretion on the part of the recipient as to how he or she would vote. Neither the language used nor the absence of any sanction support that contention. The debate shows a far reaching discussion between members and displays no evidence of closed minds in relation to the decisions that had to be taken. A fair minded and reasonable observer in possession of all of the facts would not be able to conclude on the basis of the evidence that there was any real possibility of predetermination as a result of the e-mail”

8.4 It does, however, remain the case that a Member who has a completely closed mind should not participate in decision making.

9. Issues for Discussion

9.1 This report has been presented with a view to prompting discussion about standards issues in the context of local and neighbourhood planning. Many members of the Committee have experience of these processes which they will be able to bring to the debate but to help discussion the following issues are raised:

- The report focuses on the declaration of interests . Are there other ethical issues which might arise in the local and neighbourhood planning process?
- Would the Committee endorse the advice contained in paragraphs 4.5 to 4.8 as supporting the principles of:
 - (a) selflessness;
 - (b) integrity;
 - (c) objectivity;
 - (d) accountability;
 - (e) openness;
 - (f) honesty;
 - (g) leadership
- How can the Committee ensure that Councils promote those principles in developing their local and neighborhood plans?
- Does the Committee believe that it may be able to offer assistance to Parish Councils in dealing with dispensations and in what circumstances?
- A neighbourhood plan could be produced by a neighbourhood forum whose members would not be bound by statutory requirements to declare interests or by a locally agreed code of conduct. How would the Committee promote high standards of ethical conduct in the preparation of a plan by such a body?

Recommendations

10. Members are recommended to consider the issues set out in the report and any further issues arising from debate and determine whether the Committee should take further steps

Reason: To support Members involved in local and neighbourhood planning in achieving high standards of conduct.

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Approved

Wards Affected: *List wards or tick box to indicate all* **All**

For further information please contact the author of the report

Background Papers:

None

Annexes

None