

# **PROTOCOL ON PLANNING MATTERS IN THE LONDON BOROUGH OF MERTON**

**March 2013**

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# LONDON BOROUGH OF MERTON

## PROTOCOL

### ON PLANNING MATTERS

#### Introduction

**The aim of this protocol:** to ensure that in the planning process there are no grounds for suggesting that a decision has been biased, partial or not well founded in any way.

**The key purpose of planning:** to control development in the public interest.

**Your role as a member of the Planning Applications Committee (PAC):** to make planning decisions openly, impartially, with sound judgement and for justifiable reasons.

**When the protocol applies:** this protocol applies to ALL members at all times when involving themselves in the planning process. (This includes when taking part in the decision making meetings of the Council in exercising the functions of the Planning Authority or when involved on less formal occasions, such as meetings with officers or the public and consultative meetings). It applies as equally to planning enforcement matters or site specific policy issues as it does to planning applications.

**If you have any doubts about the application of this protocol to your own circumstances you should seek advice early, from the Monitoring Officer or one of his or her staff, and preferably before any meeting takes place.**

## **1. Relationship to Members' Code of Conduct**

- 1.1 At its meeting on 11 July 2012 the Authority adopted its new Code of Conduct. The Code of Conduct sets out general provisions and obligations for Members and refers to the requirements of the Localism Act 2011 with regard to the registration and disclosure of disclosable pecuniary interests. This protocol is intended to explain and supplement the Code of Conduct and Localism Act provisions in the context of development control.
- 1.2 You should apply the rules in the Members' Code of Conduct first, which must always be complied with.
- 1.3 You should then apply the rules in this protocol which seek to explain and supplement the members' Code of Conduct for the purposes of development control. If you do not abide by this Protocol, you may put:
- The Council at risk of proceedings on the legality or maladministration of the related decision; and
  - Yourself at risk of a complaint being made to the Monitoring Officer for breach of the Code of Conduct.

## **2. Guidance for All Members**

- 2.1 This section provides guidance for all Members including those who are members of PAC or Cabinet.
- 2.2 Members will want to engage actively and positively with planning decisions.

All members can:

- Advise objectors/applicants/others on planning procedures and how to get involved;
  - Give advice about adopted planning policies and local priorities;
  - Direct lobbyists, applicants or objectors to the relevant planning officer so their opinions can be taken into account when writing the officer's report;
  - Lead on local discussions in the preparation of the Local Development Framework;
  - Provide input into the preparation of planning or development briefs and guidance
  - Receive and pass on information eg briefings from officers on key proposals
- 2.3 To ensure that members and the Council are not open to challenge, members should:
- Preface relevant discussions with a disclaimer, the nature of which will depend on their role within the authority in the context of planning;
  - Clearly indicate that any discussions with them are not binding on the

Council;

- Be clear about the distinction between giving advice and engaging in negotiation so only engaging in the former;
- Involve officers where this will help to safeguard transparency and the appearance of bias in accordance with the advice set out below;
- Seek the advice of the Monitoring Officer when you are unsure of what you are able to do and in relation to any potential “interest” (see below)

#### 2.4 Members must not:

- Expect both to lobby and actively support or resist an application/decision and subsequently vote at committee or Cabinet;
- Seek to put undue pressure on officers or members of a decision making committee to support a particular course of action in relation to a planning application or other planning decision.

#### 2.5 **All Members: Declaration of Disclosable Pecuniary Interests:**

2.5.1 All members must register their disclosable pecuniary interests (DPIs) as defined in The Relevant Authorities (Disclosable Pecuniary Interests) Regulations 2012. If the DPI is registered or notice of it has been sent to the Monitoring Officer but not yet registered, the DPI does not need to be declared at the meeting. However, you may choose to declare it in any event in order that it is clear why you are not participating in the meeting.

If the DPI has not been registered or is not pending registration the existence and the nature of the DPI must be declared at any relevant meeting, including informal meetings or discussions with officers and other Members.

#### 2.5.2 **Where your interest is a disclosable pecuniary interest**

- You must not participate, or give the appearance of trying to participate, in the making of any decision on the matter by PAC.
- You must not represent ward views, get another Ward member to do so instead.
- You must not get involved in the assessment of the application by the case officer.
- You must not seek or accept any preferential treatment, or place yourself in a position that could lead the public to think you are receiving preferential treatment, because of your position as a Councillor. This would include, where you have a disclosable pecuniary interest in a proposal, using your position to discuss that proposal with officers or members when other members of the public would not have the same opportunity to do so.

- You should be aware that, whilst you are not prevented from seeking to explain and justify a proposal in which you have a disclosable pecuniary interest to an appropriate officer, in person or in writing, you are not permitted to speak or vote on the matter unless you have obtained a dispensation from the Monitoring Officer. You should withdraw from the meeting when the matter is considered even though you may not be participating in the decision making.

2.5.3 You should notify the Monitoring Officer in writing of your own or any spouse/partner's application and note that:

- you should send the notification to the Monitoring Officer no later than submission of that application where you can;
- the application will always be reported to the Committee as a main item and not dealt with by officers under delegated powers; and
- you may employ an agent to act on your behalf on the application in dealing with officers and any public speaking at Committee.

2.5.4 Where a Member is in any doubt about whether they have an interest they are advised always to seek advice of the Monitoring Officer or an officer in the Council's Legal Services team prior to the meeting.

### **3 Additional Guidance for Ward Members who are not members of PAC or the Cabinet**

3.1 Members, in their roles as ward councillors will often be approached by parties – members of local communities, developers, landowners seeking both their support and their opposition to proposals and this is a key role for members who are not on the decision making bodies. Ward members can take part in planning discussions and make representations on planning matters and act as advocates for their communities by:

- Joining or leading local campaigns;
- Speaking at the relevant committee in support or against a proposal, policy or enforcement action;
- Acting as advocate for their community on a particular issue

3.2 To promote transparency and following best practice Members should:

- When speaking/making representations at the appropriate decision making committee or Cabinet make it clear their role in any local campaign or supporting any particular position;
- Make it clear when acting as an advocate or making representations on planning matters that they are not part of the decision making process and;

- Only carry out any lobbying of their decision making colleagues in favour of a particular planning decision in an open and transparent way

3.3 Officers will notify ward councillors of Presentations/Exhibitions which they will be invited to attend

#### **4 Additional Guidance for Members of PAC**

##### **4.1 PAC Members: Declaration of Disclosable Pecuniary Interests**

Paragraphs 2.5.1 to 2.5.4 above apply equally to all members.

##### **4.2 Avoidance of bias or predetermination**

4.2.1 Members have a legal duty to avoid bias or appearance of bias. Members also need to ensure they do not do anything which indicates they have made their mind up on an application/policy matter before it comes before the committee eg by stating in advance how they will vote.

*Bias* has been defined as a tendency towards one side because of an irrelevant factor such as a close relationship. Eg determining a planning application in relation to an application made by your brother. The legal test for bias is “*whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased*”. If this test is met, the member should not take part in the decision. Note that the definition of bias goes beyond the definition of disclosable pecuniary interest.

*Predetermination* is considered to be having a closed mind in a case. On the other hand a *predisposition* in a particular case means holding a provisional view, which however strongly held is capable of being changed by relevant argument or factor. Predisposition will not invalidate a subsequent decision, but care must be taken to avoid predetermining or appearing to have predetermined an application or other case.

4.2.2 Section 25 Localism Act 2011 has sought to clarify the law regarding predetermination. Section 25 applies where a decision by members is challenged on the grounds of “bias, predetermination or otherwise”.

4.2.3 Section 25 states that:

*“A decision maker is not taken to have had or 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 that matter and*
- (b) the matter was relevant to the decision.”*

4.2.4 Whilst section 25 provides some comfort to members on the extent to

which they are entitled to express firm views on matters before decisions are made it still remains the case that members must retain an open mind at the time the decision is made and be prepared to listen to the views of officers and deliberations at the committee meeting.

- 4.2.5 You should not make up your mind, or appear to have made up your mind (particularly in relation to an external interest or lobby group), on how you will vote on any planning matter prior to formal consideration of the matter at the meeting of the planning committee and of your hearing the officer's presentation and evidence and arguments on both sides.
- 4.2.6 If you have made your mind up and then take part in the decision it will put the Council at risk of a finding of maladministration and of legal proceedings on the grounds of there being a danger of bias or pre-determination or a failure to take into account all of the factors enabling the proposal to be considered on its merits.
- 4.2.7 You are able to take part in the discussion of a proposal when acting as part of a consultee body, provided:
- the proposal does not substantially affect the well being or financial standing of the consultee body;
  - you make it clear to the consultee body that your views are expressed on the limited information before you only;
  - you must reserve judgement and the independence to make up your own mind on each separate proposal, based on your overriding duty to the whole community and not just to the people in that area or ward, as and when it comes before Committee and you hear all of the relevant information; and
  - you will not in any way commit yourself as to how you or others may vote when the proposal comes before the Committee; and
  - you disclose your membership or role when the Committee comes to consider the proposal.
- 4.2.8 You should not speak and vote on a proposal where you have made your mind up. You do not also have to withdraw (unless you also have a disclosable pecuniary interest), but you may prefer to do so for the sake of appearances.
- 4.2.9 As a PAC member, you can exercise your separate speaking rights as a Ward member where you have represented your views or those of local electors and where you have made up your mind, but do not have a disclosable pecuniary interest. Where you do:
- advise the Chairman that you wish to speak in this capacity

before commencement of the item;

- remove yourself from the PAC member seating area for the duration of that item;-
- and ensure that your actions are recorded.

4.2.10 It may, however, be advisable if a ward member who is not a member of PAC represented the views of the local electors in order that you can participate in the meeting.

#### **4.3 PAC Members: Development of Council- Owned Land**

4.3.1 The planning legislation specifically allows local planning authorities to determine applications on Council-owned land. Thus there is no automatic requirement for members, even of PAC, to declare an interest when taking planning decisions merely because the land is owned by the Council.

4.3.2 However where you are so committed to a particular development which is likely to be as a result of your cabinet responsibility and you may be seen as the chief advocate on behalf of the authority for the development you will be perceived by the public as being no longer able to act impartially or to determine the proposal purely on its planning merits. In such circumstances you can address the Committee but should not vote on the relevant applications. You do not have to withdraw but may prefer to do so for the sake of appearances.

#### **4.4 Members of the Design and Review Panel (D&RP) and the Planning Applications Committee (PAC)**

4.4.1 It is acknowledged that some members of the PAC are also members of the above Panel and that on occasions as part of the consultation process the Design and Review Panel will consider and comment on the design aspects of a proposed application prior to the application being considered by PAC. These members may participate in the discussion at D&RP but shall not vote on any issues arising and shall formally disassociate themselves from any conclusion reached by and/or any recommendation made by the D&RP whether by vote or otherwise. This is because, as these Members acknowledge when the item comes before PAC for its determination, their duty in law is to consider impartially and with an open mind all material considerations arising including those relating to design and conservation matters.

4.4.2 These Members will be required to make a statement at the start of the meeting acknowledging their obligations in these respects both at D&RP and PAC. These statements will be minuted.

#### **4.5 Licensing Committee Members who are also Members of PAC**

- 4.5.1 When an application for development is to be considered by PAC and the application site was the subject of an earlier licensing decision in which you participated you should declare this fact but you may remain and participate in the discussion and vote. You should be aware of the differences in criteria applicable to licensing and planning cases, and consider whether you need to take advice from the Monitoring Officer in such circumstances.

#### **4.6 Contact with Applicants, Developers and Objectors**

- 4.6.1 You should refer those who approach you for planning, procedural or technical advice to officers where appropriate.
- 4.6.2 You should not agree to any formal meeting with applicants, developers or groups of objectors where you can avoid it. Where you feel that a formal meeting would be useful in clarifying the issues, you should never seek to arrange that meeting yourself but should request the Development Control Manager to organise it. The officer(s) will then ensure that those present at the meeting are advised from the start that the discussions will not bind the authority to any particular course of action, that the meeting is properly recorded on the application file and the record of the meeting is disclosed when the application is considered by the Committee.

Otherwise, you should;

- follow the rules on lobbying;
- consider whether or not it would be prudent in the circumstances to make notes when contacted; and
- report to the Monitoring Officer any significant contact with the applicant and other parties, explaining the nature and purpose of the contacts and your involvement in them, and ensure that this is recorded on the planning file.

#### **4.7 Attendance at Presentations/Exhibitions by Applicants/Developers**

- 4.7.1 Members of PAC may attend presentations/exhibitions organised by an applicant or objector. Members should adhere to the following:
- 4.7.2 Unless a meeting is open to the public don't attend a planning presentation unless an officer is present and/or it has been organised by officers. The timing of such meetings should be agreed with officers.
- 4.7.3 You can ask relevant questions for the purposes of clarifying your understanding of the proposals.
- 4.7.4 You should remember that the presentation is not part of the formal

process of debate and determination of any subsequent application, this will be carried out by the Planning Applications Committee.

- 4.7.5 You should avoid expressing an opinion on the merits of the proposal which could indicate you have made up your mind without hearing all the arguments.
- 4.7.6 Officers will notify Ward Councillors, consultees and objectors of the presentation/exhibition which they will be invited to attend.

#### **4.8 Lobbying of Councillors**

- 4.8.1 You should explain to those lobbying or attempting to lobby you that, whilst you can listen to what is said, you must not let it prejudice your impartiality and therefore your ability to participate in the Committee's decision-making and so cannot express a firm view or an intention to vote one way or another .
- 4.8.2 You should remember that your overriding duty is to the whole community not just to the people in the ward and, taking account of the need to make decisions impartially and for justifiable planning reasons, that you should not improperly favour, or appear to improperly favour, any person, company, group or locality.
- 4.8.3 You must not accept gifts or hospitality from any person involved in or affected by a planning proposal.
- 4.8.4 You must promptly refer to the Monitoring Officer any offers made to you of planning gain or constraint of development, through a proposed s.106 Planning Obligation or otherwise.
- 4.8.5 You should inform the Monitoring Officer where you feel you have been exposed to undue or excessive lobbying or approaches (including inappropriate offers of gifts or hospitality).
- 4.8.6 You should note that, unless you have a disclosable pecuniary interest, you will not have breached this Protocol through:
  - listening or receiving viewpoints from residents or other interested parties:
  - making comments to residents, interested parties, other Members or appropriate officers, provided they do not consist of or amount to pre-judging the issue and you make clear you are keeping an open mind.
  - seeking information through appropriate channels; or
  - being a vehicle for the expression of opinion or speaking at the meeting as a Ward member, provided you explain your actions

at the start of the meeting or item and make it clear that, having expressed the opinion or ward/local view, you have not committed yourself to vote in accordance with those views and will make up your own mind having heard all the facts and listened to the debate. It would, however, be advisable to leave representing ward interests to ward members who are not members of PAC.

#### **4.9 Lobbying by Councillors**

- 4.9.1 You should not lead or act as a spokesperson of an organisation whose primary purpose is to lobby to promote or oppose planning proposals. If you do, you are likely to be judged as being biased or having predetermined the issue.
- 4.9.2 You can join general interest groups which reflect your areas of interest and which concentrate on issues beyond particular planning proposals, such as Victorian Society, CPRE, Ramblers Association or local civic society, but disclose an interest where that organisation has made representations on a particular proposal and make it clear to that organisation and the Committee that you have reserved judgement and the independence to make up your own mind on each separate proposal.
- 4.9.3 You should not excessively lobby fellow councillors regarding your concerns or views nor attempt to persuade them that they should decide how to vote in advance of the meeting at which any planning decision is to be taken.
- 4.9.4 You should not decide or discuss how to vote on any application at any sort of political group meeting, or lobby any other Member to do so. Political Group Meetings should never dictate how Members should vote on a planning issue.

#### **4.10 Site Visits**

##### **4.10.1 Site Visits by PAC**

It is not general practice to arrange site visits for the Committee. Such site visits will only be considered where the expected benefit is substantial.

- 4.10.2 You should not request a site visit unless you feel it is strictly necessary because:
  - The impact of the proposed development is difficult to visualise from the plans and any supporting material, including photographs taken by officers (although if that is the case, additional illustrative material should have been requested in advance); or

- There is a good reason why the comments of the applicant and objectors cannot be expressed adequately in writing or by verbal presentation at the Committee meeting.

### **Site Visits by individual members of PAC**

- 4.10.3 Many members will already be familiar with sites which are the subject of applications but not in all cases. It is normal and proper for members in these circumstances to visit a site themselves before the Committee meeting. Where individual members of the Committee wish to undertake their own site inspection prior to the Committee meeting, these should be conducted unannounced and from a public vantage point. Members of the Committee should not arrange to meet applicants/agents or third parties for the purpose of a site inspection.
- 4.10.4 If a Committee member is approached on site by any applicant/agent, objector or other third party interest they should seek to avoid discussion of the application and should ensure they do not give any indication of their views or the likely decision of the Committee.

### **4.11 Conduct at Meetings**

- 4.11.1 You should not allow members of the public to communicate with you during the Committee's proceedings other than through the scheme for public speaking, as this may give the appearance of bias. You should avoid communicating privately with applicants and objectors during the Committee meeting.
- 4.11.2 Avoid speaking to other members whilst the applicant or objectors are making representations to PAC. It may give the impression you are not taking into consideration their views.
- 4.11.3 Be aware of public perception. You should be paying attention to the discussion at all times.
- 4.11.4 Do ensure that you comply with the Council's procedures in respect of public speaking.

### **4.12 Membership of other Bodies**

- 4.12.1 A member who is a member of a local lobby or campaign group should carefully consider whether they can participate in a planning application where the group has campaigned for or against a particular proposal.
- 4.12.2 A member should consider the nature of their involvement with the group; the publicly expressed views of the lobby or campaigning group; what has been or done in relation to the particular group and consider whether they have predetermined the issue or "*whether the fair minded and informed observer, having considered the facts, would conclude*

*that there was a real possibility” that the member was biased.*

## **4.13 Decision Making**

### **A. The importance of approved policies in decision making**

On making a decision on a planning application the law requires a local planning authority to have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations

- 4.13.1 You should ensure that, if you request a proposal to go before the Committee rather than be determined through officer delegation, that your reasons are recorded and repeated in the report to the Committee.
- 4.13.2 You should come to meetings with an open mind and demonstrate your willingness to listen.
- 4.13.3 You must comply with section 38(6) of the Planning and Compulsory Purchase Act 2004 and make decisions in accordance with the Development Plan unless material considerations indicate otherwise.
- 4.13.4 You should come to your decision only after due consideration of all the information reasonably required upon which to base a decision. If you feel there is insufficient time to digest new information or that there is simply insufficient information before you request a deferral but do not use lack of information as a basis for moving refusal.
- 4.13.5 You should not vote or take part in the meeting’s discussion on a proposal unless you have been present to hear the entire debate, including the officers’ introduction to the matter.
- 4.13.6 You should have recorded the reasons during the meeting for PAC’s decision to defer any proposal.
- 4.13.7 You should make sure that if you are proposing, seconding or supporting a decision contrary to officer recommendations or the development plan that you clearly identify and understand the planning reasons leading to this conclusion/decision. Detailed reasons must be given including policy references. These reasons must be given prior to the vote and be recorded. Be aware that you may have to justify the resulting decision by giving evidence in the event of any challenge.

### **B. Reports to Committee**

Officers’ written reports to committee aim to be accurate and concise and provide all relevant information. They describe the proposal and have a reasoned planning assessment of the proposal including an analysis of all relevant planning policies and other material planning considerations. They contain a written recommendation justified on the basis of relevant development policies and other material planning considerations. They cover consultations

and other representations, but may not include copies of all letters of objection or support received. They will, however, summarise any material planning considerations contained in such representations. Complete copies of all such correspondence are placed on the planning file and are available to members.

- 4.13.8
- You should advise the case officer as soon as is practicable if you become aware of information relevant to the determination of a case which is on the Planning Applications Committee Agenda. Failure to do so may result in deferment of the case causing unnecessary delay.
  - You should contact the Development Control Section Manager as soon as possible if you wish to discuss the interpretation of information in a planning applications committee report.

### **C. Decisions contrary to policy and/or recommendation**

The law requires that decisions must be taken in accordance with the Development Plan unless material considerations indicate otherwise. Officers will advise in their report what arguments put forward by an applicant/objector or supporter to an application are considered capable of constituting material considerations.

If members are minded to approve an application contrary to policy or officer advice, they must identify clear and substantiated reasons capable of constituting material planning considerations.

## **5 Additional Guidance for Cabinet Members**

5.1 Cabinet members may be approached by parties, members of local communities, developers, landowners seeking both their support and their opposition to planning matters as are those serving on PAC. In these circumstances the same opportunities and constraints apply as to members generally but the level of potential scrutiny is likely to be higher

### **5.2 Cabinet Members: Declaration of Disclosable Pecuniary Interests**

Paragraphs 2.5.1 to 2.5.4 apply equally to all members.

### **5.3 Cabinet Members – Avoidance of Bias and Predetermination**

5.3.1 Cabinet members are referred to the guidance on bias, predetermination and predisposition in paragraph 4.2 above which applies to all members as appropriate.

5.3.2 For clarity support for an overall policy stance or objectives, as distinct from a specific application of that policy approach in any decisions would be regarded as legitimate predisposition, rather than a predetermination which would render a member's involvement in decision making unsafe.

## **5.4 Cabinet Members – Attendance at presentations/exhibitions and site visits**

5.4.1 The formulation of policy and the development of site briefs may benefit from early engagement by members. Officers may prepare a committee report or briefing note, or arrange a presentation or meeting in order to identify or debate key issues. This provides the opportunity for cabinet members to raise questions of their own or seek further information regarding a proposed policy.

5.4.2 Information presented and comments made at such briefings/meetings will have regard to the stage of negotiations and their sensitivity and possible links to other large scale schemes or planning activities which raise the same issues.

## **5.5 Cabinet Members: Planning and property functions: Development of Council-owned land**

5.5.1 The planning legislation specifically allows local planning authorities to determine applications on council owned land so there is no automatic requirement for members of the cabinet to declare any interest when making planning decisions eg on planning briefs, merely because the land is owned by the council.

5.5.2 When a former council site is being considered by Cabinet (eg for inclusion in the LDF or for a planning brief) and a cabinet member was also member of the cabinet when a decision was taken on the disposal of the land he/she should declare this but the member concerned may remain and take a full part in any decision taken.

## **5.6 Cabinet Members who are also PAC members**

5.6.1 When a proposal is under consideration at a PAC meeting and a committee member was also a member of the Cabinet making a decision eg a planning brief this should be disclosed but the member concerned may remain and take a full part in any decision taken. However, where a member is identified with a development, for example as the lead proponent of a council led Development, then the member should declare his involvement, may address the committee but should take no further part in the discussion and should not vote.

5.6.2 Where a cabinet member was part of the cabinet meeting which determined the planning brief affecting land where a planning application is now to be determined the member can take a full part in the committee discussions as the planning brief is council policy.

## **6 Role of Officers**

6.1 You must not put pressure on officers to put forward a particular recommendation. (This does not prevent you from asking questions or

submitting views to the Development Control Section Manager, which may be incorporated into any committee report).

- 6.2 You should recognise and respect that officers involved in the processing and determination of planning matters must act in accordance with the Council's Code of Conduct for Officers and their professional codes of conduct, primarily the Royal Town Planning Institute's Code of Professional Conduct. As a result, planning officers' views, opinions and recommendations will be presented on the basis of their overriding obligation of professional independence, which may on occasion be at odds with the views, opinions or decisions of the Committee or its Members.

## **7 Training**

- 7.1 You should attend the council arranged training on planning matters before participating in decision making at meetings dealing with planning matters.
- 7.2 You should endeavour to attend any other specialised training sessions provided, since these will be designed to extend your knowledge of planning law, regulations, procedures, Codes of Practice and the Development Plans beyond the minimum referred to above and thus assist you in carrying out your role properly and effectively.