

CABINET ITEM COVERING SHEET PROFORMA

AGENDA ITEM

REPORT TO CABINET

11 SEPTEMBER 2008

**REPORT OF CORPORATE
MANAGEMENT TEAM**

CABINET/COUNCIL DECISION

**ALTERATIONS TO THE CONSTITUTION – DECISIONS MADE CONTRARY TO OFFICER
RECOMMENDATION AND INFORMAL HEARINGS**

Regeneration and Transport – Lead Cabinet Member- Councillor Cook

1. Summary

Following several recent cases where applications contrary to officer recommendation have been the subject of informal hearings through the appeals process, it is considered that it would be beneficial to establish an agreed protocol, clearly setting out the roles and responsibilities of Members and Officers throughout this process. To inform this proposal, benchmarking took place with other authorities, and a number of scenarios were assessed, along with examination of the Royal Town Planning Institute (RTPI) code of professional code and planning advice notes on the matter.

In addition to this, there are increasing concerns about the number of planning decisions which are being made contrary to officer recommendation in cases where the planning merits clearly do not support the decisions which Members wish to make and the risk that this poses to the authority both in terms of reputation and of potential costs. It is proposed to introduce a new procedure prior to the determination of such applications.

This report therefore examines both issues and proposes alterations to the constitution in line with the recommendations made.

2. Recommendations

1. That Cabinet agree the alterations to the constitution and protocol for planning appeals, and recommend approval of such by Council
2. That the necessary changes to the Constitution be made and the Planning Code of Conduct be updated to incorporate the Protocol.
3. That a review be undertaken by the Head of Planning and the Chair of Planning Committee in consultation with the Cabinet Member for Regeneration & Transport one year after the implementation of the protocol for appeal hearings and inquiries made contrary to officer recommendation.

3. Reasons for the Recommendations/Decision(s)

This report is presented to Cabinet to clarify the method by which the Council will deal with planning appeals and to alter the constitution with regards to decisions made contrary to officer recommendation by Planning, in order to make a more transparent, streamlined and

efficient service, consistent with the ambition and aspiration of excellence embedded into Stockton on Tees Borough Council.

4. Members' Interests

Members (including co-opted Members with voting rights) should consider whether they have a personal interest in the item as defined in the Council's code of conduct (**paragraph 8**) and, if so, declare the existence and nature of that interest in accordance with paragraph 9 of the code.

Where a Member regards him/herself as having a personal interest in the item, he/she must then consider whether that interest is one which a member of the public, with knowledge of the relevant facts, would reasonably regard as so significant that it is likely to prejudice the Member's judgement of the public interest (**paragraphs 10 and 11 of the code of conduct**).

A Member with a prejudicial interest in any matter must withdraw from the room where the meeting considering the business is being held -

- in a case where the Member is attending a meeting (including a meeting of a select committee) but only for the purpose of making representations, answering questions or giving evidence, provided the public are also allowed to attend the meeting for the same purpose whether under statutory right or otherwise, immediately after making representations, answering questions or giving evidence as the case may be;
- in any other case, whenever it becomes apparent that the business is being considered at the meeting;

and must not exercise executive functions in relation to the matter and not seek improperly to influence the decision about the matter (**paragraph 12 of the Code**).

Further to the above, it should be noted that any Member attending a meeting of Cabinet, Select Committee etc; whether or not they are a Member of the Cabinet or Select Committee concerned, must declare any personal interest which they have in the business being considered at the meeting (unless the interest arises solely from the Member's membership of, or position of control or management on any other body to which the Member was appointed or nominated by the Council, or on any other body exercising functions of a public nature, when the interest only needs to be declared if and when the Member speaks on the matter), and if their interest is prejudicial, they must also leave the meeting room, subject to and in accordance with the provisions referred to above.

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SUMMARY

Following several recent cases where applications contrary to officer recommendation have been the subject of informal hearings through the appeals process, it is considered that it would be beneficial to establish an agreed protocol, clearly setting out the roles and responsibilities of Members and Officers throughout this process. To inform this proposal, benchmarking took place with other authorities, and a number of scenarios were assessed, along with examination of the Royal Town Planning Institute (RTPI) code of professional code and planning advice notes on the matter.

In addition to this, there are increasing concerns about the number of planning decisions which are being made contrary to officer recommendation in cases where the planning merits clearly do not support the decisions which Members wish to make and the risk that this poses to the authority both in terms of reputation and of potential costs. It is proposed to introduce a new procedure prior to the determination of such applications.

This report therefore examines both issues and proposes alterations to the constitution in line with the recommendations made.

RECOMMENDATIONS

1. That Cabinet agree the alterations to the constitution and protocol for planning appeals, and recommend approval of such by Council
2. That the necessary changes to the Constitution be made and the Planning Code of Conduct be updated to incorporate the Protocol.
3. That a review be undertaken by the Head of Planning and the Chair of Planning Committee in consultation with the Cabinet Member for Regeneration & Transport one year after the implementation of the protocol for appeal hearings and inquiries made contrary to officer recommendation.

BACKGROUND

1. Reports for consideration by the Planning Committee are prepared by officers and authorised by the Head of Planning or Development Services Manager. The reports set out the professional views of planning officers in respect of the material planning considerations and relevant planning policy, and conclude by making a recommendation to committee.
2. Section 38(6) of the Planning and Compulsory Purchase Act 2004 requires that local authorities determine applications in accordance with the provisions of the development

plan unless material considerations indicate otherwise. The relevant Development Plans are the Regional Spatial Strategy (RSS), Tees Valley Structure Plan (TVSP) and the Stockton on Tees Local Plan (STLP). However Members may consider that there are other material considerations that would lead them to make a decision contrary to that recommended by the Head of Planning and that is part of the democratic process and within their legitimate rights to do so.

3. Where an application is refused, or is granted subject to conditions, the applicant has the right of appeal to the Planning Inspectorate (PINS). Appeals can be carried out by written representations where each party submits their case in writing or by way of informal hearings or public inquiries. One of the documents sent to PINS as part of the appeal process is the committee report, which will record the decision made by Members. A copy of the relevant committee minutes is also enclosed. Clearly where a decision does not follow the officers recommendations the onus is on Members to explain their decision.
4. Matters recently came to the fore following the informal hearing into the 3 planning applications at Blair Avenue in Ingleby Barwick. All 3 applications were refused contrary to officer recommendation, and the appeals were all subsequently allowed following an informal hearing where the Inspector awarded costs to the appellant. The Appellant has submitted an invoice for fees of just over £22,500. In the decision notice, the Inspector commented that “elected members...were not able to present any technical reasons why reliance should not be placed on the recent and unequivocal endorsement of the scheme by the Council’s senior professional officers...nor did they present any technical or aesthetic arguments to support the reason for refusal.” The reasons for refusal could clearly not be substantiated at appeal, despite similar advice by officers to committee at the time.
5. The support provided to Members in such cases therefore needs to be strengthened and consideration be given on how evidence and information is presented at appeal hearings depending on the circumstances of each case.
6. There are several pieces of guidance for officers faced with having to defend an appeal at hearing or inquiry where the decision is contrary to their professional opinion. The RTPI is the governing body for professional planners, and they have a Code of Professional Conduct which at paragraph 3 states that “Members shall not make or subscribe to any statements or reports which are contrary to their own bona fide professional opinion and shall not knowingly enter into any contract or agreement which requires them to do so.”
7. As well as being governed by the Code of Professional Conduct, professional planners are guided by Practice Advice Notes (PAN), and PAN 4 specifically refers to planners at inquiries. In this document, it argues that:-

“Clearly the planner whose bona fide professional opinion is not in conformity with the case the evidence is supposed to support, is unlikely to be the best witness in such a case. It will be for those responsible for the conduct of the case to judge. The planner should ensure that whoever is so responsible is aware beforehand of the difference of opinion that may be revealed at the inquiry if the planner is called as a witness.

If, nonetheless, a planning officer is called in such circumstances, the person conducting the case and the employing authority must be prepared to accept the consequences of such a revelation, if it is made. The better alternative is not to require that officer to give evidence, but to call someone else, who is in a position to speak with conviction of the reasons for the authority’s decision. If the officer is the chief planning officer this may involve calling the Chair of the Planning Committee. Equally an authority might seek to employ a planning consultant.

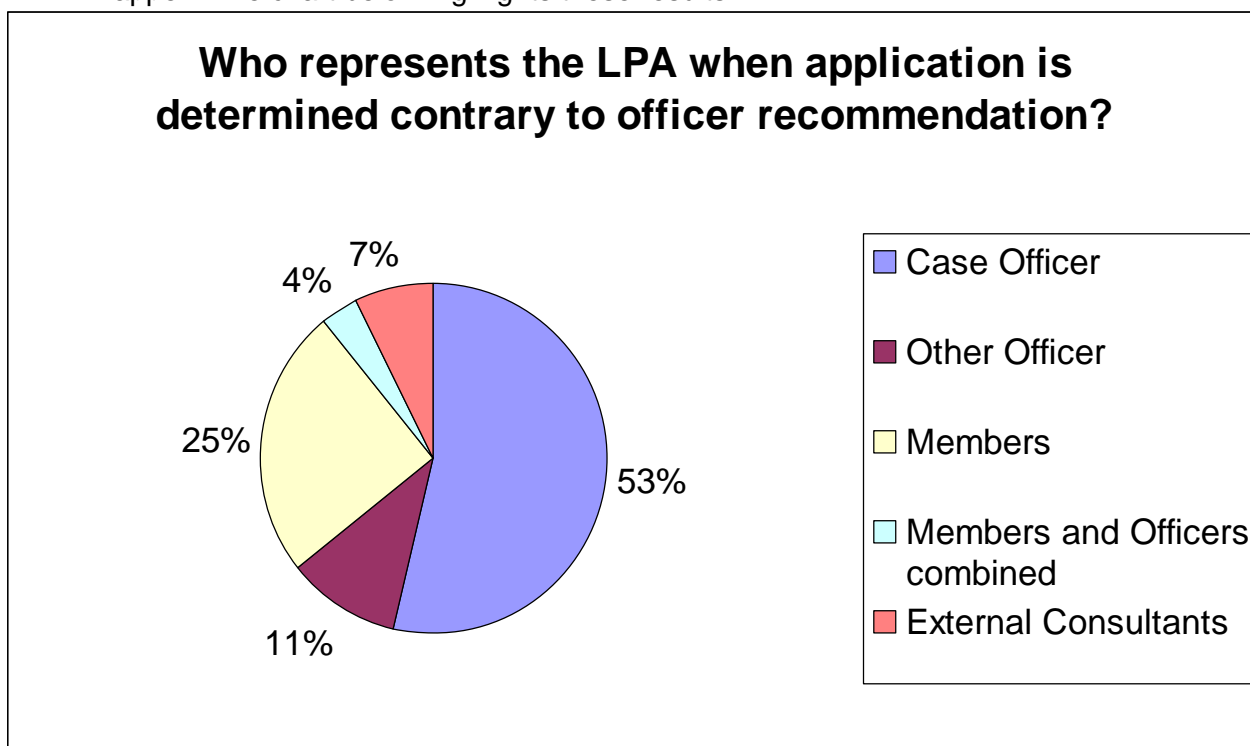
It is important that a planning officer, as a member of the planning profession, should be able to maintain professional integrity by being frank and open about his or her professional

opinion or the advice given to their authority. It is also important to the good name of the employing council as a planning authority that this should be so. That Councils may not always follow the advice of their officers is of the essence of democratic local government, which would be suspect if this were not so. The professional officer too may have a change of opinion, but this must be on the basis of professional judgement, and not because an authority, its members or other officers have prevailed upon the officer to put forward his or her professional view as something other than it really is.”

BENCHMARKING

8. To put matters into perspective, during 2007/08, there have been 24 decisions made contrary to officer recommendation, representing 16.33% of the total number of decisions made at committee. Of those, 17 have been the subject of an appeal, and of the 15 appeals determined to date, PINS have allowed 9 (Wearmouth Construction, former school house at Wynyard, The Grange on Urray Nook Road, 3 at Blair Avenue in Ingleby Barwick, Clock House in Yarm, 62-64 High Street Yarm, and the roundabout in Thornaby) resulting in a performance of 60%, the benchmark of a good local authority being 30%. The corresponding figure for officers for the same period until July 2008 for appeals allowed following delegated refusal is 32.69% (17 out of 52 appeals). There are still 2 outstanding appeals awaited, both informal hearings that required Member involvement. It is to avoid repeating such scenarios and the potential costs involved, that the protocol has been drawn up.

9. In order to gain a clearer understanding of what other authorities did, a benchmarking exercise took place through the Planning Officers Society (POS) and by contacting adjacent authorities to gain a Tees Valley/Durham/North Yorkshire perspective. Of the authorities who responded, 64% allowed the case officer or another officer to attend the hearing, 7% used consultants, and 29% allowed Members to represent the Council. Of the 29% who used Members, 4% had officers in attendance as well. Very few authorities had an actual protocol or policy in place regarding representations contrary to officer recommendation, but many authorities spoken to said that it was such a rare occurrence that it was not an issue for them, hence the use of officers on the rare occasions when it did happen. The chart below highlights these results.



CONSIDERATIONS RELATING TO THE NEW PROTOCOL

10. In order to ensure that decision making is consistent and relates solely to the policies of the Development Plan, before any final decision is taken, if the Planning Committee is minded to approve or refuse an application contrary to officer recommendation, it is suggested that planning/legal officers be given the opportunity at the meeting to provide Members with advice regarding the impact of the Committee's proposed decision including the legal implications, likely outcome and costs. This will also improve the quality and accountability of the decision making process.
11. If the officers are of the view that the reasons for approval or refusal are reasonable, lawful and sustainable on appeal, the matter can be determined accordingly at that committee meeting.
12. However, if the Committee is still minded to approve or refuse the application contrary to officer's recommendation and contrary to officers advice that the reasons for doing so are unreasonable, unlawful or unsustainable on appeal, the committee will be advised that the decision must either be minded to approve or minded to refuse the application. After the meeting, Planning and Legal officers in consultation with the Corporate Director of Development and Neighbourhood Services and/or Director of Law and Democracy will consider whether the conditions/reasons are reasonable, lawful and sustainable. If it is considered that they are, the decision notice will be issued accordingly. If not, the Corporate Director will report back to the next Committee and ask Members to reconsider the matter in light of the legal advice and any other advice that may be sought in the intervening period. This will have implications for performance targets as a 3 week delay would often take the application beyond the 8 or 13 week determination period.
13. If a decision is appealed and the appeal method chosen is written representations, then planning officers will prepare the appeal questionnaire and statement of case, following consultation with legal officers and Members as appropriate.
14. If notification is received that an appeal will be by way of an informal hearing, the Head of Planning will consider if a planning officer can present the Authority's case. If the planning officer is unable to speak with conviction and in support of the decision made by Members, support and assistance will be given to those Members who have indicated that they are willing to substantiate the decision on appeal. It is expected that the member who proposed or seconded the motion contrary to officer recommendation will take on that role. The final option would be the appointment of a planning consultant.
15. Officers will prepare the questionnaire and statement of case. The statement of case will then be sent electronically to the Members involved, who will have 5 working days from date of receipt to read the statement, suggest any further comments they may wish to add to their statement, and ensure they are happy with the material to be presented. Following consultation with legal officers, the statement will be submitted.
16. Prior to the date of the hearing, officers will arrange a meeting with the members involved to offer guidance and support, go through the planning application in detail and answer any queries or concerns that Members may have. At the hearing itself, Members will be accompanied by either a planning officer or a planning consultant. Officer support will relate to procedural matters and defend any application for costs, with advice to members on technical and policy matters if the need arises. Officers will not give evidence on the merits of the case, as the Members role will be to explain the Planning Committee's decision and reasons. Officers and Members will also attend any site visit that the Inspector may wish to make.

17. Any other Member who wishes to attend the hearing as an interested party or Ward Member representing the local people may do so, but only in that role and not as a representative of the Local Planning Authority, and that role must be made clear to the Inspector at the start of the hearing. Any Member attending a hearing as representative of the Local Planning Authority must undergo mandatory training prior to the event, and a session on hearings and inquiries will be held after the first available committee following adoption of this protocol. However Ward Councillors who wish to attend as an interested party are also welcome to attend the mandatory training session for representative Councillors prior to each hearing or inquiry. Should the planning officer in attendance be asked for their own professional opinion, then this must be given and may be contrary to the Council's case. Otherwise at hearings, it is the Council's case which is being examined, and not necessarily that of an individual person, as there is no cross examination from the appellant or his representative.
18. For appeals that are determined by Public Inquiry the Head of Planning will again consider if a planning officer is able to present the Authority's case and, if they cannot do so, a planning consultant will be engaged to act as an expert witness on behalf of the Authority. The Council's legal team will represent the Authority and may appoint a barrister where necessary.
19. The option of appointing planning consultants for informal hearings and Public Inquiries will have budgetary implications that will need to be addressed through the medium financial plan, as the costs could be significant, particularly if costs are also awarded in favour of the Appellant.
20. **Appendix 1** sets out the suggested protocol for determining applications that do not accord with officer recommendations.

PLANNING COMMITTEE CONSULTATION

21. A report was presented to members of Planning Committee on 2nd July 2008. Whilst there was general discussion about the proposals, both for and against, there were no specific recommendations to be made to Cabinet about the principle or content therein. Councillors involved in the process should have an input into the statement of case before it is sent out, and this is acceptable, bearing on mind the timescales involved in the actual process. Members were advised that they should contact the case officers during the processing of the appeal to be aware of the issues and clarification on any technical matters. A suggestion was made that a review of the appeal process be undertaken in a year, and this recommendation has been included in this report.

CONCLUSION

22. The overall package of measures carried out in recent years within the Planning Service have led to significant improvements to the speed and quality of the service and its accessibility by members of the public. There have undoubtedly been some difficulties, but Members will recognise the continuing need to maintain improved performance and service delivery. In order to protect the Council from potential costs with regards to hearings and inquiries involving decisions made contrary to officer recommendation, a new procedure regarding deferral of such items with a recorded decision of minded to approve or refuse is recommended. This will enable the item to be referred back to Committee if it is felt that the reasons for refusal cannot be defended on appeal. Adopting a clear protocol for hearings and inquiries, will reduce the risk not only of costs but also the Council's reputation. It will also clearly identify roles and responsibilities and provide the appropriate level of support to Members.

FINANCIAL IMPLICATIONS

23. There is a cost to the authority in terms of loss of reputation, but there is a financial cost to hiring consultants to defend the decisions of the Local Planning Authority and the resultant costs that could be awarded against the Council for unreasonable conduct and the unnecessary burden placed upon the appellants because of this. These costs could potentially be significant, and would need addressing through the medium term financial plan. Performance is related to HPDG, which could be affected by deferrals to allow the Corporate Director of Development and Neighbourhood Services and/or Law and Democracy to assess the case.

LEGAL IMPLICATIONS

24. The adoption of a protocol for decisions taken contrary to officer recommendation will minimise the risk of the Council being unable to substantiate reasons for refusal of planning permission and the award of costs on any subsequent appeal.
25. If the protocol is approved the Council's constitution will be updated to record the decision making process.
26. Whilst legal advice and assistance is available for appeals that are dealt with by written representations and Public Inquiries, legal officers are not permitted to present the Councils case at informal hearings. This does not, however, prevent legal advice being obtained in relation to the appeal prior to the informal hearing.

RISK ASSESSMENT

27. This report on the changes to the constitution and informal hearings is categorised as low to medium risk. Existing management systems and daily routine activities are sufficient to control and reduce risk.

SUSTAINABLE COMMUNITY STRATEGY IMPLICATIONS

28. Planning policy is part of the framework which enables the Community Strategy to be implemented and development services the physical manner in which it is delivered. Economic Regeneration Objective 6 'Ensure good and sustainable design in regeneration schemes and new developments-Meet government targets in determining planning applications' is relevant to this report. The proposal has no direct impact upon community safety.

EQUALITIES IMPACT ASSESSMENT

29. This report is not subject to an Equality Impact Assessment because it is a procedure which is universally applied regarding processes within Planning Services.

CONSULTATION INCLUDING WARD/COUNCILLORS

30. Relevant to all Ward Councillors, and the matter was reported to Planning Committee on 2nd July 2008.

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Background Papers

RTPI Code of Professional Conduct
PAN 4, planners at inquiries
Planning and Compulsory Purchase Act 2004
Planning Committee Report of 2nd July 2008

Ward(s) and Ward Councillors:

All Ward Councillors

Property

The report has no implications in relation to Council policy, the Capital Programme or the Asset Management Plan

APPENDIX 1

Protocol for the roles and responsibilities of Officers and Members for appeals relating to decisions taken contrary to officer recommendation

Planning Committee shall:-

- Agree the precise wording of the reasons for refusal or the conditions to be imposed prior to the vote being taken
- State their reasoned justification for reaching that particular decision and in cases where the Head of Planning, Corporate Director of Development and Neighbourhood Services or the Legal Adviser are of the opinion that the reasons are unreasonable, unlawful or unsustainable will record the decision as minded to approve or refuse for the reasons outlined
- Agree which Members will represent the Council at an informal hearing if an appeal is subsequently submitted
- For informal hearings, Members will comment on the statement of case within 5 working days and attend pre-appeal meetings with planning and legal officers
- Appear on behalf of the Council at the hearing to explain the Planning Committee's decisions and reasons
- Attend the site visit with the Inspector and interested parties
- Attend mandatory training prior to attendance in any capacity at informal hearings or public inquires

Officers will:-

- Advise Members of Planning Committee regarding the proposed decision and its implications prior to any vote on the application
- Refer back to Committee any minded to approve or refuse decision which the Head of Planning, the Corporate Director of Development and Neighbourhood Services or the Legal Adviser do not consider to be reasonable, lawful or sustainable for the Committee to reconsider the matter in light of the report
- Provide Members with professional assistance and prepare the statement of case
- Ensure the relevant documents are dispatched and PINS timetables adhered to
- Arrange appropriate venues, notifications and publicity
- Provide support at hearings in procedural matters, suggest conditions and help to defend any application for costs
- Attend the site visit with the Inspector and interested parties
- Appoint consultants where appropriate and assist the consultants in preparing the Council's case
- Provide appropriate training to Members