

31 JANUARY 2006

REVIEW & UPDATE OF LOCAL PROTOCOL ON PLANNING & LICENSING ALL WARDS

The Local Protocol on Planning and Licensing set out in the Council's Constitution was last reviewed and updated in May 2002.

Since that time, there have been further legislative changes, most notably the coming into force of the Licensing Act 2003.

The Local Protocol has therefore been reviewed and updated to accommodate the changes brought in by the new Licensing Act and the revised version is ***attached***.

Members are asked to approve the revised local protocol for adoption in the Council's Constitution in May 2006.

CONTRIBUTORS

ACE (P&P)

RECOMMENDATION:

That the revised and updated Local Protocol on Planning & Licensing be approved

GUIDANCE FOR COUNCILLORS AND OFFICERS DEALING WITH PLANNING AND LICENSING

Background

1. This guidance was first agreed by the Council on 28 April 1998. It should be read alongside the statutory Councillors' Code of Conduct, which was issued to all Councillors on taking office and which they have given a signed undertaking to observe. The Councillors' Code of Conduct is set out elsewhere in this Constitution.
2. This guidance reflects the outcome of the work of the Nolan Committee on Conduct in Local Government, previous work by the local authority associations, advice issued by the Audit Commission and the Local Government Ombudsman, and the various professional bodies in the planning field. The guidance also incorporates much of the advice set out in the Local Government Association publication '*Probity in Planning*' published in November 1997. Parts of that guidance (e.g. on site visits) are not considered relevant or appropriate to the handling of planning issues within an inner London Borough, and therefore are not followed by this Council.
3. While the guidance has no statutory status, failure to observe its recommendations without good reason may be taken into account in any investigations for maladministration, or by the Council's Standards Committee when investigating allegations of breach of the Code of Conduct.

Training of Councillors

4. It is the Council's policy to arrange training for all Councillors serving on the Planning and Licensing Committees. Councillors must undertake this training prior to serving on these Committees. Other Councillors should also attend the training to give them an understanding and overview of planning and licensing issues.
5. In relation to licensing issues, the procedures followed by the Council's Licensing Sub-Committee are set down in detailed guidance documents issued to both the applicant and objectors. This will be reviewed in the light of experience of the working of the Licensing Act 2003. Further advice for Councillors and officers involved in the licensing process is set out later on in this Protocol.

General role and conduct of Councillors and officers

6. The basis of the planning system is the consideration of private proposals against wider public interests. While Councillors on the Planning Applications Committee will need to take account of the views of their constituents (which also includes those who did not vote for them) , they must be careful not to favour any person, group, company or locality, nor put themselves in a position where they appear to do so, during their involvement in the decision-making process.
7. The basis of the licensing process is more quasi-judicial. Councillors serving on the Licensing Sub-Committee must determine each application on the evidence presented by both the applicant and any objectors at a hearing. Councillors need to take account of the views of objectors who may or may not be their constituents, but should not favour any person, group, company or locality, nor put themselves in a position where they appear to do so, in making the decision. The Council also operates a practice whereby Councillors are debarred from sitting on any Licensing Sub-Committees determining applications which fall within their own wards.
8. The advice in the Code of Conduct on dealing with gifts and hospitality can be particularly relevant when dealing with planning and licensing issues. Councillors and officers should be very circumspect in response to any offers of gifts and hospitality, should seek appropriate advice where necessary, and should record in the relevant register any gifts or hospitality they do receive. This applies particularly in circumstances where it is known that planning or licensing applications have been submitted, or are likely to be submitted, by the parties making such offers.

Declaration and registration of interests

9. The requirements and guidance for registering and declaring interests are set out in the statutory Councillors' Code of Conduct and in the officers' Code of Conduct. The Local Government Ombudsman's publication '*Guidance for Good Practice on Members' Interests*' also provides helpful advice.
10. All Councillors are required to register, and keep up to date, a written declaration of their interests in a Register held by the Assistant Chief Executive (Policy & Partnerships). Officers are required to register their interests on Departmental registers, held by their departmental personnel sections.
11. Detailed guidance on dealing with members' **personal** and **prejudicial** interests can be obtained from the Head of Legal Services. The general

test for deciding whether a personal or prejudicial interest exists and ought to be declared is whether a member of the public, knowing all the facts, would reasonably think that the Councillor or officer would be influenced by it. While guidance on declaring interests can be obtained from the Head of Legal Services, ultimately, the responsibility for declaring any interest lies with the individual Councillors themselves.

12. Where a Councillor has declared a **prejudicial** interest, they should not take any further part in the proceedings (i.e. not speak or vote) and should normally withdraw from the meeting unless a dispensation has been obtained beforehand from the Council's Standards Committee.

Development proposals submitted by Councillors, officers and council

13. In circumstances where current or former Councillors or officers, or their close friends and relatives, are involved in submitting planning applications, it is important that such applications are processed without suspicion of any impropriety. Where situations arise which could create significant questions in the minds of the public, such applications should be referred to the Planning Applications Committee for determination, and a copy of the report forwarded to the Assistant Chief Executive (Organisational Development) as the Council's Monitoring Officer.
14. Proposals for the Council's own development should be treated in the same way as those from private developers, in accordance with Circular I 9/92, particularly in relation to officer advice.

Lobbying of and by Councillors

15. Lobbying is a normal and perfectly proper part of the political process. Those who may be affected by a planning decision will often seek to influence it through an approach to their ward Councillor or a member of the Council's Planning Applications Committee. As the Nolan Committee's Third Reports states, 'It is essential for the proper operation of the planning system that local concerns are adequately ventilated. The most effective and suitable way that this can be done is via the local elected representatives, the Councillors themselves'.
16. However, lobbying can, unless care and common sense are exercised by all parties concerned, lead to the impartiality and integrity of a Councillor being called into question. When being lobbied, Councillors, and members of the Planning Applications Committee in particular, should take care about expressing an opinion which may be taken as indicating that they have already made up their mind on the issue before they have been exposed to all the evidence and arguments. In such situations, they should

restrict themselves to giving procedural advice, including suggesting to those who are lobbying, that they should speak or write to the relevant officer, in order that their opinions can be included in the officer's report to the Committee. If Councillors do express an opinion, they should make it clear that they will only be in a position to take a final decision after having heard all the relevant evidence and arguments at Committee.

17. The following specific issues also need to be observed:

- Given that the decision on a planning application cannot be made before the Committee meeting, when all available information is to hand and has been duly considered, any political-group meeting prior to the Committee meeting should not be used to decide how Councillors should vote. The view of the Ombudsman on this issue is that the use of political 'whips' at group meetings in this way is contrary to the (previous) National Code, amounting to maladministration.
- Councillors should in general avoid organising support for, or opposition to, a planning application, and should avoid lobbying other Councillors. Such actions can easily be misunderstood by parties to the application and by the general public
- Councillors should not put pressure on officers or lobby for a particular recommendation.
- Councillors who are unsure whether an interest should be declared should seek the advice of the council's Monitoring Officer, although as indicated above, the decision to declare an interest ultimately rests with the Councillor.

18. In the licensing process, the role of Councillors is different from the above. A Ward Councillor may attend a Licensing Sub-Committee hearing as an objector in their own right, or as the named representative of one of the parties, speaking on their behalf. A Councillor may therefore take a more active part in the licensing process than is the case for planning applications.

Pre-application discussions (planning and licensing)

19. Discussions between a potential applicant and the Council, especially on larger and/or more complex development proposals before the submission of a planning application, can be of considerable benefit to both parties. Potential applicants may seek meetings to discuss fairly detailed proposals, or they may wish to explore basic planning requirements before committing to initial design or even before acquiring a site. In some cases, prospective

site purchasers may be in competition and the advice they seek will affect their tender price. In all such cases, it is beneficial for the Council to be able to advise at an early stage on how planning policy would be applied and known local factors taken into account.

20. Pre-application discussions on planning matters must be handled carefully, particularly because the prospective applicant will often expect them to take place on a confidential basis for commercial reasons. It is also important to avoid any discussions becoming, or even being seen to be, part of a lobbying process that could prejudice proper consideration of a subsequent planning application and any public consultation.
21. To avoid problems arising, the following guidelines should be followed (and they apply equally to meetings held after an application has been made):
 - It must always be made clear at the outset that the discussion will not bind the Council to making a particular decision on a planning application, and that any views expressed by officers or Councillors are personal and provisional. By the very nature of such meetings, not all relevant information will be to hand, neither will formal consultations with interested parties have taken place.
 - Advice must be consistent and based on the Local Development Framework and known material considerations. There should be no significant difference of interpretation of planning policies between planning officers. In addition, all officers taking part in such discussions should make clear whether or not they are responsible for making the recommendation to Committee (or have delegated authority to determine applications).
 - A written note should be made of potentially contentious meetings or telephone discussions, and a follow-up letter will normally be sent when documentary material has been left with the Council. If Councillors are present at meetings, at least one officer must attend.
 - Care must be taken to ensure that advice is impartial otherwise any subsequent report to Committee could be seen to be in advocacy. In cases where there is competition between prospective purchasers or design consultants, officers will prepare a note on the application of normal planning policy and other known material considerations to the site. This will be used to ensure consistency of advice.
22. Any pre-application discussions on licensing matters are normally between officers and either the applicant or objectors. These usually relate, in the case of applicants, to discussions around technical requirements. In the

case of objectors, they relate to the process. However, within the licensing process there does exist a conciliation procedure. Officers attempt to reconcile areas of concern raised by objectors by seeking changes or concessions from the applicants. On some occasions, a conciliation meeting is arranged for both sides to attend. Interested Councillors are also notified and may attend to speak in support of objectors and their concerns. In these circumstances, Councillors would be bound by the appropriate procedural requirements. This would exclude them from being part of the subsequent decision-making process.

Officer reports to committees

23. The LGA guidance sets out five points for officers to take into account in preparing reports on planning applications. These reflect good practice, and failure to adhere to them could give rise to maladministration findings or judicial review of a decision.
- Reports should be accurate, and cover, among other things, the substance of objections and the views of people who have been consulted, as recommended by the Ombudsman in their Guidance Note No 2.
 - Relevant points will include a clear exposition of the development plan, site or related history, and any other material consideration.
 - Reports should have a clear written recommendation of action. Oral reporting (except to update a report) should be extremely rare and carefully minuted when it does occur.
 - Reports should contain a technical appraisal which clearly justifies the recommendation.
 - If the report's recommendation is contrary to the provisions of the Development Plan, the material considerations which justify this must be clearly stated.

Public speaking at Planning Applications Committee and Licensing Sub-Committee

Planning Applications Committee (PAC)

24. There are no public speaking rights at Planning Applications Committee. Public representations to Committee are normally made through petitions and/or deputation requests. Petitions made on a planning application are incorporated into the officer report to Planning Applications Committee. Petitions on traffic management issues are considered separately by the Traffic Management Advisory Panel and the relevant Cabinet Member. Petitioners, as members of the public, are welcome to attend meetings, but are not permitted to speak. They can however be represented by their

Ward Councillor, who may address the Committee. Deputation requests are not accepted on applications for planning permission.

Licensing Sub-Committee

25. The public, in the form of Objectors, may speak at Licensing Sub-Committee if certain procedures are met. The Council's Licensing section deals with any petitions and public representations regarding licensing matters, and may hold reconciliation meetings between members of the public objecting and the applicant. If any objections cannot be reconciled then members of the public become official objectors, and have the opportunity, if required, to speak at a Licensing Sub-Committee hearing and call witnesses. The applicant may also call witnesses on their behalf, if required.
26. Petitions made on licensing matters will be considered only if they are policy related and/or not in response to statutory advertising. This function will fall normally to the Licensing Committee. It is also possible to request a deputation to the Leader's Committee, but only if licensing policy matters are being considered under the Council's decision making and scrutiny process.

Decisions contrary to officer recommendation and/or development plan

27. Officers' reports on planning applications must make clear when proposals are not in accordance with the adopted Local Development Framework. All such applications are advertised in accordance with the requirements of Article 8 of the Town and Country Planning (General Development Procedure) Order 1995. Where officers' reports recommend the grant of planning permission for departure applications, the report will include a full justification for the departure, clearly identifying the circumstances which led to a recommendation to override the Development Plan. The Committee report will be forwarded to the Secretary of State if the application is one which requires referral under the regulations.
28. If the Committee makes a planning decision contrary to the officers' recommendation (whether for approval or refusal), before passing the resolution, the Chair will invite the officers to explain the implications of the decision. If the Committee then resolves contrary to officers' advice, their reasons for doing so must be made clear and recorded in the Committee minutes. Officers will be able to assist in formulating technically correct reasons for refusal or additional planning conditions based on Members' clearly expressed wishes. If this is the case, it should either happen during the meeting, or be delegated to planning officers by the Committee. This too should be clearly recorded in the minutes.

Site visits

29. Visits by members of the Planning Applications Committee to development sites will not normally take place. If, due to the exceptional circumstances of a particular case, the Committee wishes to organise a site visit, this shall be by resolution of the Committee and will involve the attendance of appropriate planning officers as well. The application or enforcement case in question will then be determined either by a subsequent formal meeting of the Committee, or by officers acting under authority delegated to them by the Council, or by specific resolution of the Planning Applications Committee.

Party Group Practices at LBHF in respect of planning matters

30. The Nolan Committee recognised that Councillors exercise, quite properly, two roles in the planning system. They determine applications, and also act as representatives of public opinion in their areas. Nolan recognised the importance of guidance to enable Councillors to achieve the 'delicate balance' in undertaking these two roles. Very prescriptive requirements on, for example, pre-application discussions, were not favoured by Nolan, as not necessarily being appropriate to all local authorities. It was felt that authorities should have some room to determine their own ground rules, within a local code.
31. In respect of 'lobbying' of and by Councillors, London Borough of Hammersmith & Fulham is content to work within the guidelines developed by the LGA. Some additional local factors in respect of party group consideration of planning issues should, however, be noted by Councillors.
 - a) The political parties on the council may develop general policies towards different types of development within the borough and discuss these within group meetings.
 - b) There will be occasions when specific development proposals or planning applications are discussed within pre-meetings, prior to formal determination at committee. The council does not consider such discussions to represent the 'fettering of discretion' of Councillors subsequently determining planning applications, provided individual Councillors have regard to all relevant considerations at the time of voting on an application.
 - c) In such circumstances, the extent to which the decisions of a group meeting are carried, the force of a 'whipped' decision, backed by disciplinary action, would be material. (For example, the national Labour Party rules for local authority group meetings specifically

forbid whipping on such matters as planning applications and licensing matters, and states that 'each member shall form his or her own judgement according to the evidence').

- d) It is the view of all parties on the council that the political conventions and practices operated within the council reflect a proper balance between the two roles Councillors are expected to undertake, as identified by the Nolan Report.

Councillors & Licensing Sub-Committee hearings

32. The Council's Licensing sub-committee deals with all licensing applications under the Licensing Act 2003, together with some miscellaneous non-Licensing Act functions, such as street trading.
33. Where the Licensing Sub-Committee is dealing with an application under the Licensing Act 2003, the Act imposes limitations as to who may appear before the Sub-Committee and make representations to it. (NB: this does not apply to hearings concerning non-Licensing Act functions). In such cases, Councillors do not automatically have a right to attend and make representations by virtue of their office.

Eligibility to speak under the Licensing Act

34. In order to be able to speak at a Licensing Sub-Committee hearing, a Councillor must fall into one of the categories of "interested parties" under the Licensing Act. An "interested party" is defined as:-
- A person living within the vicinity of the premises to which the application relates;
 - A person involved in a business in that vicinity;
 - A body representing such persons

A Councillor can therefore only be an "interested party" for the purposes of the Licensing Act if they live or have a business interest in the vicinity.

35. The Council must hold a hearing to determine a licensing application if it receives "relevant representations" from an interested party within the prescribed period (generally 28 days from the date of receipt of the application by the Council). To be a "relevant representation", the objection must be about the likely effect of the grant of the licence on the four licensing objectives, and may not be frivolous or vexatious (as determined by the authority).
36. Only parties to the hearing or their representatives may address the Licensing Sub-Committee. An interested party who has made a relevant

representation is a party to the hearing. A person who is not an interested party, or who has not made a relevant representation, (including one made out of time), is not a party, and may not speak.

37. There is a provision which allows a party to a hearing, on giving the proper notice (either 1, 2 or 5 working days before the first day of the hearing, depending on the nature of the application), to request that another person be allowed to attend the hearing to address the authority in relation to their case. Whether to allow such a request is a matter for the Sub-Committee.
38. A Ward Councillor would therefore be eligible to speak at a Licensing Sub-Committee under the Licensing Act if:-
 - a. they are an interested party who has made a relevant representation themselves; **or**
 - b. an interested party who has made a relevant representation has asked them to represent them;
 - c. they are permitted to address the Sub-Committee following a request made by an interested party within the relevant time period.

Application of the Councillors' Code of Conduct

39. Even if a Councillor is eligible to speak under the Licensing Act, he/she may still be required to declare a personal interest and, if a prejudicial interest arises, such Councillor will be precluded from speaking at all, and may not be present when the application is considered by the Sub-Committee. In such a case, the Councillor may still make written representations, but may not seek to improperly influence the decision.
40. It should be noted that where a Councillor has a prejudicial interest, they may not be present when it is being discussed by a formal meeting even though this might put them at a disadvantage compared to ordinary members of the public. Councillors may not "act in a personal capacity" so as to avoid the requirements of the Code of Conduct, and this has been confirmed by the Court of Appeal in the case of **Richardson**. Any Councillor considering speaking at a Licensing Sub-Committee in circumstances where a personal or prejudicial interest may arise is therefore advised to obtain prior advice from the Head of Legal Services (Michael Cogher or Andy Beresford) before doing so.