

REPORT OF DIRECTOR OF PARK DIRECTION AND PLANNING

SUBJECT: REVISION TO PROCEDURES WHERE MEMBERS TAKE PLANNING DECISIONS COUNTER TO OFFICER RECOMMENDATIONS AT DEVELOPMENT MANAGEMENT COMMITTEE

1. Purpose of Report

- 1.1 To propose a new process relating to the Development Management Committee whereby members are clear as to the consequences of their decision making. This excludes decision making by members in relation to the preparation and review of the Local Development Plan. Should similar issues arise then a tailored approach to fit the circumstances would need to be agreed.

2. Introduction

- 2.1 This report considers the scenario when members are minded to take planning related decisions contrary to the advice and recommendations of officers.
- 2.2 The Authority has an existing procedure in place to deal with the situation, the wording of which is set out below. However, because the planning system needs to be seen as fair, impartial, objective and consistent, this is an aspect of decision-making that continues to be closely scrutinised and challenged.
- 2.3 A review has therefore been undertaken looking at the latest position across Wales to understand how the existing procedure fits with current thinking. The review has also helped inform potential changes and improvements.
- 2.4 Reproduced at **Appendix 1** are the formal procedures adopted by a selection of other local planning authorities (LPAs) across Wales, which form part of their constitutional arrangements. This information is included for comparative purposes.
- 2.5 Having considered all available evidence, the report recommends changes to the existing procedure adopted by the Authority.

3. Legal Context

- 3.1 Section 70(2) of the Town and Country Planning Act 1990 says that when dealing with planning applications, LPAs shall have regard to the provisions of the development plan so far as material to the application and to any other material considerations. Section 38(6) of the Planning and Compulsory

Purchase Act 2004 says that if regard is to be had to the development plan for the purposes of making any determination under the Planning Acts, the determination must be made in accordance with the plan unless material considerations indicate otherwise.

3.2 This places the primacy of the provisions of the development plan on a statutory footing.

4. Planning Policy Wales Edition 7 July 2014 (PPW)

4.1 In terms of national policy, the primacy of the development plan is reinforced through PPW where it states that the legislation secures a presumption in favour of development in accordance with the development plan for the area, unless material considerations indicate otherwise.

4.2 The recommendations made by officers on all planning applications follow these principles.

5. Public Services Ombudsman for Wales – Code of Conduct Guidance

5.1 This guidance, published in September 2012, places an expectation on members to follow the professional advice they receive unless there are strong reasons for not doing so. It states that where a decision is made not to follow advice, it is highly advisable to record the reasons for taking such an approach, for example, in any relevant minutes.

5.2 The guidance also states that in reaching decisions where advice is not provided by statutory officers, an example of which would be that received at a planning committee meeting, members should still have regard to the advice provided and take it into account in reaching any decision. Whatever the reasons for voting against officer advice, the guidance stresses the importance of a record being made.

6. Welsh Government Research

6.1 In June 2010, having been commissioned by Welsh Government, Consultants GVA Grimley published a study examining the planning application process in Wales. Recommendation 9, for the production of a guide for LPAs on the organisation of planning committees, focussed on standardising procedures between LPAs, measures to improve performance including mandatory training for members and the introduction of cooling-off periods where decisions go against the advice of officers.

6.2 The recommendation also said that consideration should be given to the practice where members departing from officers' recommendations are required to defend their decisions without the assistance of officers.

- 6.3 In response to the study, Welsh Government confirmed that current guidance would be reviewed and new best practice guidance issued. Fortismere Associates were commissioned in association with Arup to look into the operation of planning committees in greater detail. The study was published in July 2013.
- 6.4 It considered the role of members in appeal proceedings. Recommendation 2 is that a National Planning Committee Protocol be adopted, which, amongst other things, should address the role of members in any appeal proceedings following an overturn of an officer recommendation.
- 6.5 Recommendation 7 supports the cooling off period approach, stating that committees should defer applications to the next committee meeting when minded to determine an application contrary to an officer recommendation. This is in order to allow time to reconsider, manage any associated risk and ensure officers can provide additional reports and draft robust reasons for refusal or conditions for approval.

7. Positive Planning – Proposals to Reform the Planning System in Wales

- 7.1 In December 2013, Welsh Government published its consultation document on proposals to amend the planning system. At the same time, a draft Bill was published.
- 7.2 The consultation document acknowledged the research that had been undertaken and recognised the tensions that exist in decision making. The proposals set out the Welsh Government's intention to work with stakeholders to implement the changes recommended by the research including the establishment of a national planning committee protocol to be incorporated into each authority's constitution to control procedures at planning committee meetings.
- 7.3 The consultation document noted that a mixture of legislation, guidance and training would be required to achieve this. These measures were not included in the draft Bill in favour of changes being made when the Bill is introduced to the National Assembly for Wales.

8. Planning (Wales) Bill

- 8.1 There are a number of current Welsh Government consultations supporting the new Planning (Wales) Bill issued on 6 October 2014. One of the consultations relates to planning committees and seeks to address the variances that the above research highlighted.
- 8.2 Whilst regulations are proposed to introduce a national scheme of delegation and to prescribe the size and make up of planning committees, legislation is not proposed for one of the other aspects, namely a national protocol to standardise committee procedures. This will be designed in time and with help from the

Welsh Local Government Association (WLGA) to make the committee experience more predictable and consistent across Wales.

9. Welsh Government Circular 23/93

- 9.1 The Circular remains valid and is concerned with potential awards of costs incurred in planning proceedings and sets out in detail the nature and extent of behaviour that could be seen as being unreasonable, thereby potentially justifying such an award.
- 9.2 It says that in any appeal proceedings, the LPA will be expected to produce evidence to substantiate each of its reasons for refusal, by reference to the development plan and all other material considerations.
- 9.3 In addition, it states that whilst local planning authorities are not bound to adopt, or include as part of their case, the professional or technical advice given by their own officers, or received from statutory bodies or consultees, they will be expected to show that they had reasonable planning grounds for taking a decision contrary to such advice and they were able to produce relevant evidence to support their decision in all respects. Furthermore, local planning authorities will be expected to produce evidence in support of advice on which the authority is relying.

10. Existing PCNPA Position

- 10.1 The current Pembrokeshire Coast National Park Authority wording is as follows:

Where members resolve to take a decision, contrary to an officer's recommendation, which the Chief Executive (National Park Officer) (or in his absence the Head of Conservation) identifies as constituting a significant departure from an approved plan or policy of the Authority, or as otherwise having significant implications for the Authority, the decision shall be deferred until the next meeting of the Committee.

If, ultimately, the Committee's decision is contrary to the officer recommendation, there shall be taken a full minuted record of Members' reasons for rejecting the officer recommendation, together with a recorded vote. (Policy Committee, 10/97)

- 10.2 In many ways, the existing procedure fits neatly with current thinking and guidance insofar as it relates to the requirement / suggestion for a cooling off period.
- 10.3 Absent from the existing policy, however, is information relating to the potential role of members in any appeal proceedings subsequent to a decision being taken contrary to officer recommendation.

11. Comparison with other LPAs

- 11.1 Set out at **Appendix 1** are a selection of comparable procedures adopted by other Welsh LPAs.
- 11.2 Clearly, the situation across Wales is somewhat different, which accounts for the Welsh Government view that there should be increased legislation, guidance and training to achieve greater consistency.
- 11.3 What is also clear is that the system is prescriptively controlled to varying degrees in an aim to ensure the necessary fairness, impartiality, objectivity and consistency and in order to achieve public confidence.
- 11.4 An aspect evident in other schemes currently absent from the PCNPA procedure is that which relates to the role of members in appeal proceedings.

12. Options

- 12.1 There is nothing inherently wrong in members taking a decision contrary to officer advice. However, the situation has to be closely controlled to ensure public confidence and in order to protect the organisation, members and officers. There can also be reputational issues associated with such an approach.
- 12.2 In terms of options, the existing procedure of the Authority goes some way to ensure the necessary controls are in place. There is, therefore, a do nothing option. Another option would be to await the outcome of any Welsh Government initiative before introducing any changes. The most appropriate option, however, is that certain specific improvements are made now.
- 12.3 Firstly, in the event of an application being deferred, for the reasons set out in the procedure, it needs to be made clear that the purpose of deferral is to allow time for officers to manage any associated risk by considering the matter further, producing any additional report(s) as necessary and / or drafting reasons for refusal or conditions, as appropriate.
- 12.4 Secondly, the role of members in appeal proceedings is an aspect where nationally, changes can be anticipated. Some LPAs already have procedures in place to deal with this. It is recommended, therefore, that an additional clause be added to the procedure to deal with the situation whereby a planning or related decision is made contrary to officer advice and where that decision then becomes the subject of an appeal. In such an event, it is recommended that the proposer and seconder of the motion act as the Authority's main witnesses, supported by officers.
- 12.5 The suggested detailed wording is set out in the recommendation below.

13. Financial considerations

- 13.1 One of the reasons for the recommended improvements is to reduce the risk to the Authority in terms of any potential award of costs in connection with a planning appeal.
- 13.2 Generally speaking, the proposed changes have procedural as opposed to financial implications. In addition, costs required in connection with the commissioning of consultants or legal experts in the drafting of additional reports for committee during the cooling off period would remain largely unchanged.
- 13.3 However, if similar expertise was needed to support members defending an appeal, additional or increased costs could exceptionally result although it is difficult to be able to put a figure on this.

14. Risk considerations

- 14.1 Planning decisions continue to be made on a regular basis and there are risks associated with the options of doing nothing or waiting for new Welsh Government guidance before making any changes.
- 14.2 The recommended changes would enhance governance arrangements, which would help improve the standing of the Authority and, in turn, its reputation. There would also be positive benefits in terms of public confidence.

15. Conclusion

- 15.1 It is considered that the opportunity should be taken to enhance the procedures of the Authority at this juncture and that the adopted procedure of the Authority be amended, as recommended below.

16. Recommendation

- 16.1 That, the existing policy be amended to read as follows:

Where members wish to take a decision contrary to the advice / recommendation of officers, which the Chief Executive (National Park Officer) (or in his / her absence the officer with appropriate delegated authority) identifies as constituting a significant departure from an approved plan or policy of the Authority and in particular, the Local Development Plan, or as otherwise having significant implications for the Authority, the following procedure will be followed:

Development Management Committee

- 1. When a proposal to make a decision contrary to officer advice is made and seconded and before any vote is taken, members will give valid planning grounds for taking such a decision.*

2. *Officers will advise if such reasons constitute valid planning grounds.*
3. *Provided valid planning grounds have been given, the committee will vote on the motion and, if the vote succeeds, it will be recorded in the minutes that the resolution of the committee was that it was 'minded to' make a certain decision, as will the reasons for doing so.*
4. *This starts a 'cooling off period' within which, officers will manage any associated risk by considering the matter further, commissioning expert advice as appropriate, producing additional report(s) as necessary and / or drafting reasons for refusal or conditions as required.*
5. *The matter will then be brought back to a future meeting of the committee with a further officer report and recommendation considering all relevant matters including any issues raised by the previous resolution.*
6. *Members will reconsider the matter afresh, having regard for any new evidence brought before them. A further motion will therefore be needed.*
7. *If the motion is contrary to officer advice, valid planning grounds will again be needed before any vote is taken.*
8. *Officers will advise on the grounds given.*
9. *Before the final vote is taken, members will be made aware if the circumstances mean that officers would not be able to defend the Authority's decision on appeal on the basis that to do so would conflict with their professional code of conduct.*
10. *The committee will then vote of the motion.*
11. *A full minuted record of Members' reasons for rejecting officer advice will be made, together with a recorded vote.*

Appeals

12. *In the event that any decision taken contrary to officer advice is subject to an appeal, called-in application, recovered appeal or nationally significant infrastructure project examination, it will be usual for the proposer and seconder of the motion to defend the Authority's decision and / or act as its main witnesses, supported by officers / consultants / legal experts as necessary.*

Background Documents

Welsh Government publications
Public Services Ombudsman for Wales publications
Constitutional procedures and protocols relating to the PCNPA and other LPAs

(For further information, please contact Jane Gibson / Alan Southerby)

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Appendix 1

The following excerpts from the constitutions of other local planning authorities (LPAs) in Wales all relate to procedures governing member decisions contrary to officer recommendations and / or the development plan.

Brecon Beacons National Park Authority

The Courts have expressed the view that where a planning committee makes a decision contrary to the officers' recommendation (whether for approval or refusal), such reasons should be based on sound planning considerations. The personal circumstances of an applicant will rarely provide such grounds. A notable exception is where planning policy allows for this, for example, the provision of a dwelling for an agricultural worker.

Whenever the Committee is minded to determine a planning application contrary to the officer recommendation, the Committee must define the planning reasons for rejecting the officers' recommendation and then vote on those reasons. The reasons must be recorded in the minutes and the application will be deferred to the next meeting of the Committee in accordance with the following provisions of this Protocol.

At the subsequent meeting the Head of Development Control shall have the opportunity to respond both in a further written report and orally to the reasons formulated by the Committee for not accepting the earlier recommendation. The report shall –

(a) (where Members are minded to grant permission) contain draft conditions to be attached to the grant of planning permission and, where appropriate, a recommendation concerning a planning obligation; or

(b) (where Members are minded to refuse permission) set out formal reasons for refusal reflecting the previous views of the Committee; advise upon the evidence that would be available to substantiate those reasons; and include any other reasons for refusal which the officers consider could be substantiated on appeal.

If the PAROW Committee is still of the same view, then it shall again consider its reasons for not accepting the officers' advice. Those reasons shall then be formally recorded in the minutes of that subsequent meeting.

Applications which are not in accordance with the development plan must be identified as soon as possible. They must then be advertised as such, as required by The Town and Country Planning (Notification) (Wales) Direction 2012. Secondly, if it is intended to approve such an application for a 'notification development' as defined in the above Direction, the material considerations leading to this conclusion must be clearly identified, and how these considerations justify overriding the development plan clearly demonstrated. The application may then have to be referred to the Welsh Government. If the officers' report recommends approval the justification for this should be included, in full, in that report.

Pembrokeshire County Council

Members are reminded that planning legislation requires that where the Development Plan is relevant, decisions should be made in accordance with it, unless material considerations indicate otherwise.

If the Committee appears to be about to take a decision that is contrary to the Director's recommendation:

- *The reasons for doing so should be made clear and a detailed minute made; and*
- *The Director and other officers should also be given the opportunity to explain the implication of the proposed decision, including the possibility of an award of costs against the Council in any challenge and the Director may request a deferral to a future meeting to consider the Committee's views and if necessary produce a further report.*

If the Committee:

- *does not carry a motion supporting the officer recommendation on an application i.e. the Committee is minded to make a decision which is contrary to the Director's recommendation but has not been completed by the legal requirement for justification / reasons to be identified, and:*
- *the Director considers that where the evolving decision will significantly prejudice the implementation of the JUDP / LDP,*

the Committee, prior to identifying the reasons for a possible refusal or justifying the reason for approval thereby completing the decision, will be advised that the application will be further considered at the earliest possible meeting of the Committee to enable the Director to give consideration to the Committee's views and produce a further report on the issues.

Decisions on applications that would be significantly prejudicial to the implementation of the Development Plan have to be referred to Council for decision on the recommendation from the Committee. The report to Council by the Director will identify the reasons for the Committee being minded to make a decision which significantly prejudices the implementation of the Development Plan together with an assessment of the implications such a decision might have in the future application of the Development Plan.

Major departures

Planning applications for development which by reason of its scale or nature, or the location of the application site, would significantly prejudice the implementation of the Development Plan should be advertised as a 'departure' and referred to WAG for a decision whether they wish to call-in the application for its own determination (para 4.12.2 PPW).

Examples of the type of development proposal which might significantly prejudice the implementation of the Development Plan are:-

- Applications of major importance having more than local significance;
- Applications which raise important or novel uses of development management;
- Major proposals relating to minerals and waste disposal, storage, treatment or processing;
- Applications significantly affecting PCNPA, SSSIs, listed buildings and conservation areas;
- Applications involving development for which an EIA is required, and
- Applications which through their cumulative impact with existing and / or proposed development may have a significant impact on implementation of the Development Plan.

Appeals

It should be recognised that appeals against refusals of planning permission where Officers have recommended approval can cause considerable difficulties. The Welsh Assembly Government requires notification of certain decisions which are contrary to the Development Plan and have the power to call such applications in for their consideration and eventual decision. This may entail a planning inquiry at which the Council will be required to justify its decision. Similarly, third parties have the right to challenge any decision by way of judicial review and this is more likely where the Council's own plans are not being followed. Both processes involve Officer time and Council expenditure.

Officers cannot give evidence at a public inquiry or at a judicial review contrary to the published conclusions of the Officer's reports and a cross-examination of the Officer would seriously prejudice the Council's case. This is not to say that the Committee should never go against an Officer recommendation but it does emphasise that Members should be confident that there are sound, defensible planning reasons for their refusal. Where the Committee (or Council) do not follow an Officer recommendation, the mover and seconder of the motion will act as the L.P.A.'s witnesses, supported, if necessary, by employed consultants, at any planning inquiry or court hearing.

Members who wish to appear at an appeal against a refusal or deemed refusal in support of the appellant cannot appear as representatives of the Council but can only appear in their personal capacity.

Carmarthenshire County Council

The Public Services Ombudsman for Wales has issued guidance on the Code of Conduct for Members of Local Authorities in Wales and in particular, the following specific guidance to Members:-

“As a matter of good practice, where you disagree with officer recommendations in making a decision, you should give clear reasons for your decision. This applies to decisions to vote against the advice of statutory officers, even if you lose the vote. If you decide to vote against their advice, you should ensure that your reasons for doing so are recorded in the relevant minutes. You should be aware that voting

against the advice of the statutory officers without good reason may be a breach of the Code.

In reaching decisions where the advice is not provided by the statutory officers, you should still have regard to the advice provided by officers and take it into account in reaching your decision. You may also wish to have regard to other advice you have received and, of course, to the position adopted by a political group of which you are a member. In some circumstances, such as planning decisions, you must not vote on the basis of a “whip” imposed by your group.”

When there are instances where the Committee decide to determine an application contrary to professional advice given by the officers the Chair of the Planning Committee will ensure that the following principles are followed: -

- Members shall clearly express the planning reason(s) for their decision (and these shall be minuted).*
- A member proposing refusal of an application for which the officer recommendation is approval shall state his / her reasons prior to the vote being taken. In some cases, when this occurs, the matter may need to be deferred for a further report.*

Officers shall be given an opportunity to explain to the Planning Committee the planning and / or legal implications of their intended decision before the decision is confirmed.

Where the Planning Committee wishes to add or amend conditions / reasons or attach a planning obligation, officers shall be given the opportunity to explain the planning and / or legal implications before the decision is confirmed.

Appeals

Officers will organise and generally appear as witnesses at planning appeals and other proceedings on behalf of the Council. In some circumstances (such as where specialist evidence is required or where a Member decision is contrary to officer recommendation) it may be necessary to appoint consultants to appear for the Council.

In giving evidence Officers will present the best possible case on behalf of the Council while complying with the RTPI Code of Professional Conduct. The Royal Town Planning Institute Code of Professional Practice requires, inter alia, that Planning Officers who are members of the Institute do not make statements purporting to be their own, but which are contrary to their bona fide professional opinion.

In cases where the appeal is against a decision, which the Committee has made contrary to Officers' recommendation, the planning case-officer may be able to give evidence. However in some cases, another officer or consultants will be employed if the Head of Planning Services considers that the case-officer's previously stated views (or those of the Planning Services as a whole) might be unhelpful to presenting the Committee's position.

Members can have an important role to play in appeals and may, within set deadlines, make written representations to the Inspector and may also appear at informal hearings or as a witness at public local inquiries. In doing so they should state whether they are acting in their local Councillor capacity or, exceptionally, representing the Council's case.

Where planning officers are unable to defend decisions on appeal (due to requirements of the professional conduct rules of the Royal Town Planning Institute) the Planning Committee should be aware of this before the final vote is taken. In such cases, the Committee shall nominate (at least) two of its members who voted contrary to the recommendation to appear at any appeal and explain the Committee's decisions and the reasons for them. These should normally be the proposer and seconder of the proposal, which was contrary to officers' recommendation.

Planning and Legal Officers will support Members attending or wishing to make representations at appeals and advise them on preparing and delivering evidence. Legal Officers will attend Inquiries and / or assist in preparing representations when Legal representation is required.

Neath Port Talbot County Borough Council

The Committee may determine planning applications which are contrary to any policy within the Structure Plan, Local Plans, and / or the Unitary Development Plan except that where there is a major departure in the view of the Director, and the Committee is minded to approve notwithstanding a recommendation of refusal by the Director, then the views of the Cabinet must be obtained. If the Cabinet supports the Officers view, but the Committee is still minded to approve, then the application must be referred to full Council for determination.

Powys County Council

When Members of the Planning Committee are minded to either approve or refuse a Planning Application contrary to the recommendation of the Head of Planning Services (in a written report to the Committee or communicated orally at a meeting of the Committee) those Members shall clearly identify and articulate the planning reasons supporting their view before a vote is taken on the application in question and those reasons shall be recorded in the Minutes of the meeting if the Planning Committee makes a decision contrary to the recommendation of the Head of Planning Services and a copy of the minute containing the Committee's reasons shall be placed on the relevant application file.

Where Members of the Planning Committee wish to add, modify or amend conditions which are recommended by the Head of Planning Services those Members shall clearly identify and articulate the planning reasons supporting their view before a vote is taken on the application and / or the conditions in question and those reasons shall be recorded in the Minutes of the meeting if the Planning Committee makes a decision contrary to the recommendation of the Head of Planning Services and a

copy of the minute containing the Committee's reasons shall be placed on the relevant application file PROVIDED ALWAYS that the wording of the final version of those conditions shall be delegated to the Head of Planning Services in consultation with the Chair and Local Member.

Where the Head of Planning Services considers that they would be unable to defend a proposed decision of the Planning Committee on appeal (due to requirements of the professional conduct rules of the Royal Town Planning Institute) they shall make this point known to the Committee before the final vote is taken. In such cases the Minutes of the meeting shall record the proposer and seconder of the motion to pass a resolution contrary to the recommendation of the Head of Planning Services and a copy of the minute containing such resolution shall be placed on the relevant application file.

Conwy County Borough Council

In cases of a refusal of planning permission, which the Committee has made contrary to Officers recommendation there is the likelihood of an appeal against the decision. Planning officers may consider they are unable to defend the decision on appeal due to requirements of the professional conduct rules of the Royal Town Planning Institute. In such circumstances the Planning Committee should be made aware of this before the final vote is taken. The Committee shall then nominate (at least) two of its members who voted contrary to the recommendation to appear at any appeal and explain the Committee's decisions and the reasons for them. These should normally be the proposer and seconder of the proposal, which was contrary to officers' recommendation.