# Making the Right Decision—Current Issues for Local Planning Authorities

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## The Current Context

The critical role of the planning system when it comes to delivering the corporate aspirations of local authorities is now widely recognised. In the words of the Killian Pretty Review:

> ''Planning should be seen as central to delivering the vision of the council and the community, for how the area will develop in the future and full advantage needs to be taken of the opportunity this provides for place-shaping.''[1]

It is also clear that the system has a pivotal role when it comes to achieving a sustainable recovery from the current economic difficulties. In a letter sent in May 2009 the Chief Planner at Department for Communities and Local Government (DCLG) urged Chief Planning Officers to play their part in resurrecting the housing market when demand starts to pick up. Accordingly, there is an increased emphasis on Local Planning Authorities (LPAs) taking a lead on delivery of projects and being positive and pro-active rather than regulatory and reactive when it comes to the development process. Added to this there is the prospect of local authorities becoming increasingly involved in direct development—not least in a bid to address the chronic shortage of affordable housing. This means that LPAs will more and more be in the business of determining applications for their own development proposals.

At the same time that the planning system is under pressure to deliver the type of projects that will help to stimulate the economy, increased public interest and involvement in the planning process means that the need to ensure transparency and accountability in decision making remains no less pressing. Accordingly those involved in decision making at a local level on planning matters continue to have a difficult balance to strike. They need to champion development proposals that will help to drive forward the economic recovery whilst at the same time being sensitive to public opinion and maintaining the highest standards of probity and good administration. When it comes to the latter requirement, with the increasing scrutiny of public decision making there is a heightened need to demonstrate that any decision reached has been properly arrived at.

What I will attempt to do in this paper is to consider some recent clarifications of the legal framework within which planning members have to make their decisions and offer some thoughts on what could be done to ensure that the right decision is reached—and can be shown to have been reached.

## The Right Decision?

So, against this backdrop, what amounts to the ''right'' decision?

Any decision should, of course, be legally right. This means that the normal tests for deciding whether a decision taken by a public body is lawful will apply, it should have been arrived at after having taken

[1] ''Planning Applications: a faster and more responsive system Final Report'' November 2008 p.124.



[2009] J.P.L., Issue 13 

into account all relevant decisions, ignoring irrelevant considerations and should not be unreasonable in the *Wednesbury* sense. It should also be a decision that is untainted by pre-determination or bias, either actual or apparent, of which more later.

Looking beyond the strict legal requirements, in the words of Lord Nolan, ''the planning system frequently creates winners and losers''[2] so the right decision will certainly not equate to the most popular decision. In reality the reverse will often be the case and if the LPAs are to pursue the place shaping agenda they will have to be prepared to make decisions which are unlikely to be vote winners in their localities.

Having said this, whilst a decision may not be popular, those consulted should be left in no doubt that their views have been properly aired and been given due consideration. It should also be clear to the observer of the process that the decision maker had a good grasp of the key issues. The reasoning which led to the decision should be similarly comprehensible.

## Nolan Revisited

Lord Nolan's Third Report of the Committee on Standards in Public Life included an entire chapter on the operation of the planning system at local authority level. Within this, significant column inches were dedicated to a review of the role of decision makers (and elected members in particular) in the planning process.

Whilst it was published over a decade ago, the Report includes observations on decision making in planning which were both acute and prescient.

Lord Nolan made the observation that public perception of impropriety is as important as the existence of genuine misconduct. Turning to the role of councillors, Lord Nolan's approach to this issue was rooted in pragmatism and recognition of the day-to-day political reality of local government. He rejected the notion of planning at a local level constituting a ''quasi-judicial'' process. Instead, Lord Nolan characterised councillors as leading local political figures who naturally have strong views on development proposals affecting their council. Any attempt to divorce the political role of councillors from their planning function was, according to Lord Nolan, unlikely to succeed.[3]

Unfortunately, and for reasons that are difficult to discern, the Nolan Report has been subject to a very restrictive interpretation since its publication which has resulted in an over-cautious approach to decision making. In responding to the Killian Pretty Review PPS Group characterised this as follows:

> ''the interpretation and implementation of Nolan recommendations has suffered from an overly legalistic 'precautionary approach' being promoted and adopted. Put simply, most elected Members have been scared off any contact with any type of planning applicant.''[4]

## Species of Bias

Bias in decision making can manifest itself in a number of forms. Actual bias, when it arises, is clearly an anathema to good decision making. Apparent bias is more likely to be encountered in practice and has been the subject of much judicial consideration in recent years which will be considered in the next section of this paper. Pre-determination has been classified as a species of apparent bias[5] and

[2] ''Standards of Conduct in Local Government in England, Scotland and Wales'' July 1997 para.269.
[3] Lord Nolan, Third Report of the Committee on Standards in Public Life, para.285.
[4] Killian Pretty Review p.105.
[5] Per Longmore L.J. in *R. (on the application of Lewis) v Redcar and Cleveland BC* [2008] EWCA Civ 746 at [105].

involves the decision maker's mind being closed to the planning merits of the decision in question such that the obligations of the decision maker have been abandoned.[6] In addition, accusations of apparent bias can be levelled either at individuals who make decisions or at the authority itself because it has an interest (often financial) in the outcome of the planning process. Commonly this arises where the council are considering a planning or related application in respect of the development of its own land. It may also occur if the application is closely linked to a policy initiative that is being pursued by the authority. Whilst the courts recognise that there is nothing inherently wrong in LPAs being judges in their own cause,[7] it is an area of considerable sensitivity and potential danger for authorities and I will return to this issue later in this paper.

**Recent Case Law**

A series of recent court rulings have helped to clarify the correct approach to decision making on planning issues at local authority level and in particular the relevance of pre-determination and apparent bias. I will refer to two Court of Appeal decisions that offer particular illumination in what has been a rather murky area and which both reinforce the Nolan view that planning is essentially a political rather than judicial process.

The first of these is *R. (on the application of Condron) v National Assembly for Wales* [2006] EWCA Civ 1573. This case concerned events which followed a planning inquiry into an opencast and reclamation scheme near Merthyr Tydfil. The inquiry inspector sent his report to the National Assembly for Wales so that the relevant committee could decide whether to grant planning permission in the light of the report. The day before the committee meeting the Minister (and Chair of the committee), Carwyn Jones, was stopped by Jennie Jones, a leading opponent of the scheme. When confronted by Ms Jones, the Minister was alleged to say that he was ''going to go with the inspector's report''.

The subsequent decision to grant planning permission for the scheme was challenged in the High Court. The court decided that the Minister's words gave rise to a real risk of bias because they indicated a closed mind on his part before the committee debated the matter.

The decision was appealed. In his leading judgment Richards L.J. proceeded from the now, well established, definition of apparent bias derived from the case of *Porter v Magill* [2002] 2 A.C. 357. Lord Hope's formulation is as follows:

> ''The question 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.''

With this test in mind, Richards L.J. decided that the High Court had taken too narrow a view of the circumstances that were relevant when considering what the ''fair-minded and informed observer'' would know. The High Court had excluded from its consideration the discussion that had taken place in committee because it had met in private and was therefore not accessible to the ''fair-minded'' observer. Richards L.J., however, considered that the account of events in the committee were highly relevant. The committee's actions had been investigated by the Commissioner for Standards who found that the Minister had acted appropriately at all times. Furthermore, according to Richards L.J., it was important to consider the context in which the words were spoken, namely at the end of a brief, chance encounter and in relation to a report that had come down overwhelmingly in favour

[6] *Lewis* [2008] EWCA Civ 746 per Rix L.J. at [96] and per Longmore L.J. at [105].
[7] *Lewis* [2008] EWCA Civ 746 per Longmore L.J. at [102].

of the development and to which significant weight should be attached. According to Richards L.J., it was necessary to look at all the relevant circumstances, not just the facts known to the objectors or available to the ''hypothetical observer'' at the time that the decision was made.

Applying this approach to the facts of the case, the Court of Appeal decided that the words ''going to go with the inspector's report'' were consistent with a predisposition towards the view expressed by the inspector in his report, rather than demonstrating that the Minister had pre-determined the application.

In delivering his judgment Richards L.J. recognised that the position of members of a planning committee is very different from that of judicial office-holders who, according to Richards L.J., are ''trained to judge and to judge objectively and dispassionately''.

In *Lewis* an outline planning permission was granted by the council to Persimmon Homes Teeside Ltd for a mixed residential and leisure development at Coatham on the Cleveland coast. In February 2007, in advance of the May 3, 2007 elections, the council's corporate communications team produced a ''Guidance Note on Publicity''. This included the following provision:

> ''Any meetings or decision making relating to the 'day-to-day' business of the Council that do not involve controversial local issues should continue to go ahead - including those meetings and decisions involving partners and outside agencies.''

Section 2 of the Local Government Act 1986 deals with the prohibition of political publicity and s.2(1) requires a local authority not to publish any material which, in whole or in part, appears to be designed to affect public support for a political party. By s.2(2), in determining whether material is prohibited, regard shall be had to the content and style of the material, the time and other circumstances of publication and the likely effect on those to whom it is directed. Guidance issued under s.4 highlights the period between the notice of an election and the election itself (frequently called ''the purdah period'') as being particularly sensitive for these purposes. In the instant case the notice of election was given on March 27, 2007 so the purdah period ran from then until May 3, 2007.

The council's ruling coalition (made up of Liberal Democrats, Conservatives and East Cleveland Independents) and officers took the view that Persimmon's planning application could be determined during the purdah period. However, the leader of the opposition Labour Group expressed the view that it would be improper for any such meeting to proceed during this time. However, the Planning Committee went ahead on April 3, 2007 and outline planning permission was granted. The decision was challenged by a local resident and the grounds of challenge included the appearance of bias or pre-determination.

In the High Court on December 20, 2007 Jackson J. decided that the holding of this particular public meeting during the purdah period was a breach of the council's guidance. He also noted the fact that the leader of the Labour opposition was opposed to the holding of the meeting during the purdah period. He considered that a ''notional observer'', whilst trusting of councillors and not unduly suspicious would regard it as a serious possibility that the coalition was trying to force through the development in question in advance of the election. The merits of the project had become a party political issue in the context of the local election and he noted that not a single member of the coalition either abstained or voted against the development. In addition, on May 1, 2007 the council had entered into a development agreement with Persimmon which committed the council to pursue the development proposals.

In the circumstances Jackson J. concluded that in the light of the guidance given in the authorities, a fair minded and informed observer, having regard to the facts in this particular instance would conclude that there was a real possibility of bias or predetermination on the part of the planning committee.

The Court of Appeal saw things rather differently. Pill L.J. made it clear from the outset that he thought that the claimants would be hard pressed to make out a case for quashing the decision given the factual context. He pointed to the fact that the proposal to develop Coatham Common for leisure and housing purposes was of long-standing and was consistent with local plan policies. The planning application had been submitted many months before the decision was taken and the council were under a statutory duty to determine it and were in fact well out of time. Significantly the grant of planning permission was consistent with the advice given by council officers and there was no suggestion that they were lacking in either objectivity or competence. The meeting itself had been conducted fairly—a church hall had been booked to ensure that all those interested in the decision could attend and make representations. Pill L.J. also pointed out that the analysis of the evidence failed to support the party political dichotomy which had been alleged by the claimant. Of the five Labour members on the Committee, two voted in favour of the planning proposal, two abstained and only one opposed.

Pill L.J. saw the main controversial issue in the case as being the decision to hold the planning committee meeting during the pre-election ''purdah'' period. That apart, Pill L.J. saw ''no possible basis for quashing''. His starting point when considering this question was the particular role of elected councillors in the planning process. According to Pill L.J. councillors are entitled to—and indeed expected to have, and to have expressed views, on planning issues and are entitled to have a disposition in favour of granting planning permission. They are not required to cast aside views on planning policy that they will have formed when seeking election or when acting as councillors.

Pill L.J. made it clear that it is for the court to assess whether committee members have in fact made a decision with closed minds or that the circumstances give rise to such a real risk of closed minds that the decision ought not to be upheld. However, the particular role of a councillor means that the appearance of bias or predetermination is less relevant to their decision making than for the judiciary. There must be ''clear pointers'' that a councillor's mind was closed, or apparently closed at the time the decision was made in order to establish pre-determination.

Longmore and Rix L.JJ. supported Pill L.J.'s general approach to the facts and jurisprudence. Rix L.J. observed that a planning decision maker in the planning context is not acting in a quasi-judicial capacity ''but in a situation of democratic accountability''. They are not required to be impartial, but rather to address the planning issues before them fairly and on their merits. In order to establish bias or predetermination something more is required than the presence of factors such as evidence of political affiliation or the adoption of policies which support a particular proposal.

Longmore L.J. considered that the test of apparent bias relating to pre-determination was a difficult one to satisfy and that the facts of this particular case were well below the threshold.

## Principles to Be Derived from the Court Decisions

Following the recent judicial examination of pre-determination and apparent bias, the following pointers can be offered.

First of all, it is clear that the courts are prepared to allow LPAs appropriate latitude when it comes to making decisions on planning matters. The notion of planning committees constituting quasi-judicial

forums has been firmly rejected and the status of members as politicians rather than judges has been acknowledged. It is also clear that a purely political predisposition in favour of a particular outcome does not equate to bias—something more needs to be established. Accordingly, this means that there is scope for members to become involved in pre-application discussions and also to take a stance in respect of particular development proposals in advance of the determination of an application for the relevant development consents without this automatically ruling them out of the process of determining planning and related applications.

Next, when considering whether or not apparent bias has been established it is necessary to consider all events leading to the decision (and also, where appropriate, those following the decision), and not concentrate on individual events in isolation. This was of clear assistance to the Welsh Assembly in *Condron* as the Court of Appeal were prepared to look beyond what transpired at the chance meeting the day before the decision was taken and consider other factors before, at the time of and beyond the day of the decision. However, this also means that particular care and vigilance needs to be exercised in the run up to the decision being made to guard against accusations of apparent bias. Also, it is clear that it is not possible to cure apparent bias by members simply stating at the committee meeting that they have not pre-determined an application or are not otherwise biased if other evidence suggests the contrary.[8]

The next point is a rather mundane but highly important one—namely that there is considerable merit in authorities being in a position to evidence the fact that a decision is in fact free from bias. In cases where the courts have considered allegations of apparent bias, the precise facts surrounding the various accusations made have been of crucial importance. Accordingly, as far as practicable, authorities should ensure that contemporaneous and accurate notes are taken of meetings (particularly where objectors are present) so that the risk of their position being misrepresented is reduced. Furthermore, it is worth noting that in *Lewis*, the steps that authority had taken to ensure an inclusive and transparent approach to the determination of the application had been factors which were material to the decision of the Court of Appeal.

*Lewis* highlights the benefits of authorities being able to point to an up to date and supportive policy framework in countering any allegations of ''institutional bias'' when they are promoting particular development proposals.

Finally, it is apparent that difficulties can arise where member contact with supporters and objectors prior to the determination of an application occurs in an unstructured and unregulated manner. For example, whilst what was said in the context of the chance encounter between the Chair of the Welsh Assembly and Jennie Jones ultimately was not enough to vitiate the decision, it certainly did not help the cause of the Welsh Assembly. Accordingly, there is merit in LPAs adopting protocols which seek to regularise member involvement in the run up to the determination of planning applications for significant and controversial planning applications. This will be of particular assistance when it comes to dealing with applications where there is an enhanced risk of accusations of bias—notably applications in which the LPA have an interest in the outcome of the application. Having said this, the attention given to the ''Guidance Note on Publicity'' in the *Lewis* case highlights the need to avoid any protocols being overly prescriptive such that they create unnecessary problems for LPAs.

[8] *R. (on the application of Lewis) v Redcar and Cleveland BC* [2008] EWCA 746 per Pill L.J. at [66].

**More on Institutional Bias**

Earlier in this paper I suggested that a distinction can be drawn between bias manifested by individual members and the possibility of ''institutional bias'', where the authority has a particular interest in the outcome of the planning process. Whilst in the light of the decision in *Alconbury*,[9] it is not open to challengers to suggest that a person or body entrusted by Parliament to make a decision cannot be allowed to do so because there is a real possibility of bias—provided that there are sufficient safeguards in place to ensure a decision is lawful—it still remains an area where authorities need to guard against accusations of partiality. This is illustrated by the case of *R. v South Glamorgan CC Ex p. Harding* (1997) Unreported November 7, 1997 QBD. This concerned an application for judicial review of a decision by the Vale of Glamorgan BC to grant itself planning permission for the creation of a Gypsy site in the open countryside for occupation by Mr Carroll and his family. Previous applications for planning permission for the use of other land as a Gypsy caravan site had been refused by the council on the grounds that the underlying intent of the relevant policies of the development plan was the preservation of the character of the countryside. The application for which permission was granted was instigated by the council's equal opportunities officer, who persuaded the council to acquire land for the provision of the site for Mr Carroll. The council's officers were persuaded of the merits of the proposal on the basis that there was an agricultural need for Mr Carroll to occupy the site which justified departure from the structure plan. Accordingly officers recommended the approval of the application on both agricultural and Gypsy grounds. The council granted permission subject to an agricultural occupancy condition. The claimant in the case was a local resident who objected to the grant of planning permission. Following local government reorganisation, the responsibilities of the council as local planning authority passed to the county council which did not seek to uphold the grant of planning permission by the council.

The High Court ruled that in circumstances where the council had been granting planning permission to itself, it was incumbent upon it to act with scrupulous care and ensure that relevant policies were adhered to and were seen to be adhered to. In the instant case it was clear that the council had not been acting in pursuance of any concerns for the welfare of Gypsies in general, but had deliberately, and unreasonably, favoured Mr Carroll as an individual as against other ordinary members of the public. There was an absence of clear evidence that Mr Carroll was working in agriculture. It was clear that the report by the council's officers to the relevant committee had been slanted towards favouring the grant of permission, and had failed to present a full and fair picture. In all the circumstances, the court was driven to the conclusion that the council's equal opportunities unit had become so blinded by the circumstances of this individual and his family that ordinary planning considerations were overlooked.

This case underlines the need for LPAs to act ''with scrupulous care'' when it comes to applications for their own development (and also applications where they have a clear interest in the outcome) and moreover to demonstrate to the public at large that they are treating applications with this degree of rigour. In terms of the latter requirement, it can be helpful if the LPA is able to establish an ''audit trail'' when it comes to such decisions which ensures that key points in the decision making process are properly evidenced. This will assist when it comes to demonstrating that the authority has approached an application with a corporate ''open mind'', taking into account and ascribing appropriate weight to relevant considerations. There is also a case in these circumstances for LPAs adopting protocols which demonstrate to the outside world the steps that are being employed to

[9] *R. (on the application of Holding & Barnes Plc) v Secretary of State for the Environment, Transport and the Regions (Alconbury)* [2003] 2 A.C. 295.

ensure that there is ''clear blue water'' between the authority acting in its capacity as LPA and with its other decision making hat (or hats) on.

## Involving Members in Pre-Application Discussions

*1) The Need For Clarity In Guidance and Advice*

At a time when the courts have effectively given the green light to member involvement at the pre-application stage, there is a considerable weight of opinion in favour of both promoting and formalising member engagement in pre-application discussions when it comes to major or controversial applications. The Killian Pretty Review stressed that it is at the pre-application stage that concerns and issues can best be addressed and reflected in the scheme which ultimately comes before members for determination.[10] Early member involvement allows the decision makers to better understand and have an input into the proposals and therefore helps to reduce the prospect of an unexpected outcome at committee. The Killian Pretty Review also points out that if pre-application discussions are going to be the norm then, in many authorities, there will be a need for a cultural change in the attitude of both councillors and officers to the decision making process in general and this stage in particular.[11] In addition there needs to be clarity of advice (notably from monitoring officers) on the appropriate boundaries at this stage—what would assist is a consistent approach when it comes to guidance on this issue. Now that the courts have provided clarification on the role of members in the planning application process I would suggest that there is the scope to issue a single guidance note which deals with the basic principles to be followed to ensure that members are protected at the pre-application stage and which takes as its starting point the change in culture referred to above.

Having been in this position myself on a number of occasions, I would pause at this stage to express some sympathy for the local authority lawyer who is often expected, at extremely short notice, to advise members of planning committees on issues of possible interests which may affect their ability to participate. Under such circumstances it is hardly surprising that the legal advice proffered can be cautious in nature and will tend towards the ''default position'' that members should not take part in a decision if they have concerns. However, by adopting an over-cautious approach, the danger is that members are being excluded unnecessarily from the democratic process which can have a corrosive effect both on member-officer relations and also undermines the efficacy of the decision making process. There is also the potential that if it emerges that the advice is incorrect, the decision taken may be vulnerable to challenge on the basis that the decision maker took into account an irrelevant consideration.[12] I would suggest therefore that a clear, succinct statement of the legal position on this issue combined with appropriate member training (more of which later) will help to reduce the potential for over-cautious advice being given ''on the hoof''.

Any such core advice should start from the fundamental position articulated in *Lewis*—that the planning process involves decisions taken in a ''situation of democratic accountability''.[13] It should also proceed on the understanding that the expectation is that members will be involved at the pre-application stage. Whilst it is of vital importance that the Association of Council Secretaries and Solicitors (AcSes), should put its name to such core advice, I would suggest that their current Model

[10] Killian Pretty Review p.104.

[11] Killian Pretty Review p.104.

[12] In *R. (on the application of Ware) v Neath Port Talbot CBC* [2007] EWHC 913 (Admin). Collins J. in the High Court held that if wrong advice from a monitoring officer had been the cause of a councillor's decision not to vote on a decision of the local authority, this could affect the lawfulness of the decision. (The decision was overturned on appeal but the principle remains).

[13] *R. (on the application of Lewis) v Redcar and Cleveland BC* per Rix L.J. at [94].

Code of Good Practice[14] requires a complete re-think as it was originally drafted some six years ago and accordingly does not proceed from an appropriate starting point. Perhaps the most obvious example of this is reflected in para.4 which urges members ''. . ...not to agree to any formal meeting with applicants, developers or groups of objectors where you can avoid it''.

It is also important that the main bodies that have an interest in the conduct of members in the planning system are prepared to endorse such core advice so that members and those advising them can be confident that any advice given which reflects its approach is unlikely to give rise to future difficulties. Accordingly, in addition to AcSes, the Standards Board and the Ombudsman will need to give it their blessing.

On a related point, in its Green Paper on local government[15] the Conservative party levels particular criticism at local authority monitoring officers who advise members that they must avoid mentioning any controversial local issue during their election campaign to prevent themselves being barred from voting on that issue if elected. In the event that they come to power they have offered to legislate to ensure that councillors (while being properly prevented from advancing personal interests) have the freedom to campaign and represent their constituents, and then speak and vote on those issues without, in the words of the green paper, the fear of breaking the rules of ''pre-determination''. In truth the need for legislation to deal with this issue is questionable—as indicated above, the law on pre-determination does not rule out the possibility of member involvement in decisions where members have been involved in campaigns on particular issues. Again, what would assist in dealing with this issue is a combination of relatively ''light touch'' core advice coupled with practical training.

Turning to additional guidance, the Local Government Association has recently issued revised guidance on probity in planning.[16] In keeping with the change of culture mentioned above, this does recognise the current role of local authorities as place makers and, crucially, the need for councillors to become engaged at the pre-application stage. However, it is made clear in the guidance that it is intended to amplify three documents, including the current AcSes guidance note. This may explain the rather restrictive approach to the involvement of planning portfolio members in decisions on planning applications. The warning is that the member may be seen as the chief advocate on behalf of the authority for a particular development and can be regarded as the 'internal applicant'. The guidance suggests that the appropriate course of action will be to argue for the development but not to vote on the application. Whilst there will be circumstances where a portfolio holder will, by their actions, have ruled themselves out of the decision making process, in my view and for reasons I refer to below, I think that the input of such a member is generally to be welcomed and encouraged. Accordingly I would suggest that the emphasis in any guidance should be on measures to keep such members in the decision making process so that the prospects of them taking part in any decisions which they are ''championing'' are maximised.

Having said this, the revised LGA guidance has much to commend it. It recommends the adoption of clear guidelines on the conduct of pre-application discussions and emphasises the importance of member training—particularly when it comes to the subject of pre-disposition, pre-determination

[14] Model Members' Planning Code of Good Practice Association of Council Secretaries and Solicitors 2007 update.

[15] ''Control Shift—Returning Power To Local Communities'' Policy Green Paper No.9, February 2009.

[16] ''Probity in planning: the role of councillors and officers—revised guidance note on good planning practice for councillors and officers dealing with planning matters''—Local Government Association May 2009.

and bias.[17] It also makes the point that it is very difficult to find a form of words which explains comprehensively how members should balance their roles as community representatives and decision makers on planning matters. This again offers support to an approach to guidance on this issue which combines the articulation of core principles coupled with some practical examples which can be explored in training sessions.

*2) Mechanisms and Protocols*

Whatever mechanism is adopted when it comes to pre-application member engagement it should reflect the two key elements of consistency and transparency.

Development Control Forums, which were recommended by the National Planning Forum in 2005 and which have been operated by LPAs including the Camden LBC and Waverley DC, reflect these essential elements. They allow the authority to identify what it sees as the key material considerations for a particular planning application and also to provide clarity on the approach of authority to these considerations. This means that members are alive to the important factors at play at an early stage. They also enable the public and others who have an interest in the outcome of the process the opportunity to familiarise themselves with the proposals early on and help to avoid accusations that development proposals are being ''pushed through'' with no proper opportunity for public engagement. The Forum allows issues that an applicant will need to address to be identified at a point before development proposals are ''firmed up'' and at a stage where there is still the scope to change tack.

In terms of format, the Forum is a public (therefore transparent) meeting offering developers the opportunity to explain proposals directly to the members who are likely to be involved in any decision on a subsequent planning application. With a view to avoiding the risk of charges of pre-determination, members are expected only to seek clarification, not to voice opinions about the merits of the proposal. Speakers appear by invitation only but anyone is able to submit written comments for consideration by the planning officer, who passes these to the developer. At the end of the meeting, the aim is to establish a consensus on the important issues. This is recorded in writing and posted on the council's website. The openness and transparency of the process are further enhanced by the fact that it is broadcast on the internet.

Whatever mechanism of pre-application member engagement is employed, this should be the subject of clear guidelines. A well-drafted protocol for the pre-application stage gives the authority the opportunity to reinforce the message that what occurs up to the door of the committee meeting is essentially aimed at gathering information and opinion on development proposals and cannot be viewed as an indication on the part of the authority—or any of its key participants—as to the likely outcome of the process. The essential purpose of the pre-application process in identifying material considerations and (assuming that the application is one that can be supported in principle) enhancing the proposals can be underlined in the protocol.

As indicated above, care needs to be taken when drafting the protocol to avoid it being over-prescriptive and setting procedural traps for the LPA.

[17] ''Probity in planning: the role of councillors and officers—revised guidance note on good planning practice for councillors and officers dealing with planning matters''—Local Government Association May 2009 para.4.14.

**Encouraging Ownership of the Policy Agenda.**

One of the consequences of the ''modernised'' local government system which was introduced by the Local Government Act 2000 has been the division of the ranks of councillors into executive members and back benchers. This has led to the risk that there is a lack of ''ownership'' by members who sit on the planning committee of their authority's policy framework and also a potential lack of understanding when it comes to the operation of these policies. There are a number of ways to tackle these shortcomings. One is to ensure that planning members are involved in policy formulation by, for example, involving them in the work of Local Development Framework steering groups. Secondly, there may be merit in ensuring that individual members are allocated responsibility as ''champions'' for certain policy areas, for example housing, retail, climate change and design. This was an approach which received support in a recent CLG report on Councillor Involvement in Planning Decisions.[18] As the report points out, the concept of a member championing a particular policy initiative is, in essence, no different to members acting as champions for their respective wards.

The appointment of the planning portfolio holder as a planning committee member provides a direct link between the policy and development management functions and was advocated by Killian Pretty.[19] Finally, (and I will return to this subject below), there is simply no substitute for good quality training when it comes to assisting members in their understanding of the link between policy formulation and development management decisions.

**Training, Training and More Training**

Training for members in planning matters generally and on probity issues as they relate to planning in particular is an essential tool when it comes to promoting good decisions. Whilst members are not professionally trained and qualified judges, this does not mean that they will not benefit from a thorough grasp of the issues with which they are expected to grapple. Training should encompass the general principles that they should apply to their decision making and also the key policy aims of the authority. Whilst the decision will ultimately rest with them and they may choose to depart from the approach set out in local policy when it comes to an individual application, they should do so with a proper understanding of the ramifications to the authority of such a departure. As suggested above, members should be encouraged to have ''ownership'' of their policies and in the absence of them being directly involved in policy formulation, training is the best way of familiarising themselves with the policy framework within which they make their decisions.

Turning to the format of such training, the Planning Advisory Service's ''Pick and Mix'' training modules provide a very good reference point for any member training. This consists of the following eight modules:

- The modernised planning system—introducing the topic with a look at the drivers for modernisation and the subsequent modernising agenda.
- Performance in planning—dealing with the performance agenda and exploring its implications for authorities.
- The role of the planning committee and its members—explaining the different roles of councillors and the roles and responsibilities of the planning committee.

[18] January 2007.
[19] Killian Pretty Review p.102.

- Probity and planning—establishing the general principles and legislative context from which a councillor should operate and establishing how a councillor would deal with interests and lobbying.
- Member skills—explaining the importance of elected members in the planning process, the different roles of members and areas of difficulty.
- Member involvement in major applications—this module examines how members can get involved and good practice in performance and managing development.
- Delegation —this module examines approach methods and practices on how best to deliver delegation.
- Local Development Frameworks—covering the ''raw materials'' of the planning system including the plan led system; material considerations; planning conditions and planning obligations.

I would suggest that any training should also cover the possible consequences of member decisions by dealing with the appeals system and providing an overview of judicial review. Having to ''threaten'' members with the possibility of costs being awarded against the authority in the event that they refuse planning permission is rarely conducive to good member-officer relations and the training room provides an opportunity to take members through the risks involved in a relatively relaxed and non-confrontational environment. The need to address this issue in depth is all the more important with the advent of the new costs regime.[20] In particular the extension of the regime to written representations means that the risk of costs being awarded—and therefore the potential financial burden faced by the LPA—is now greater than ever.

In my experience, planning enforcement is a topic of particular interest to planning members and is an important area, not least because it assists members in understanding the need to deal properly with conditions when reaching their decisions.

Training on probity issues against the backdrop of the approach taken by the courts to the role of the councillor in the planning process has the benefit of allowing members to debate issues that they may face in practice away from what are often highly charged planning committee meetings. With this in mind, the approach taken by the Standards Board in their Occasional Paper[21] has considerable merit. The guidance highlights a number of potential situations in which pre-determination or bias may arise. These include where a councillor has a connection with someone affected by the decision; where there is improper involvement of someone having an interest in the outcome of the decision; and where there has been prior involvement in the decision (for example in the case of an appeal against an earlier decision) and commenting before decisions are made. In each case examples are given of where the situations may manifest themselves. As it is simply not possible to be categorical in any advice note on the situations where apparent bias will manifest itself, taking members through various scenarios where problems may arise is an effective technique. Again in my experience, running through scenarios based on situations which are often faced by planning members draws issues out and invariably generates comments from the more experienced members based on their own personal involvement in the system which can be of considerable use to their less experienced colleagues.

Given the critical role played by the chair of planning committees I would also suggest that specific training to assist them in discharging their role could be beneficial. This could include further

[20] See Circular 03/09: ''Costs Awards in Appeals and Other Planning Proceedings''.

[21] ''Predisposition, Pre-determination or Bias and the Code'' Standards Board for England Occasional Paper August 2007

in-depth consideration of the rules on costs, additional guidance on running meetings when dealing with controversial items and a general ''masterclass'' in planning practice and procedure. There is also considerable benefit in simply getting chairs together so that they can exchange views on what is a particularly difficult and exacting role.

In my experience, training is best delivered by a combination of internal and external providers. For example, when it comes to training on probity issues, involving an external trainer can help to reinforce and strengthen important messages they receive from their officers. Internal training is more appropriate on topics such as the local policy framework where the officers who have developed the policies are best placed to explain their operation.

Unhappily, and despite some compelling arguments in favour of mandatory training, the Killian Pretty Review fought shy of advocating compulsory councillor training, recommending instead that LPAs ''should give the strongest encouragement'' to councillors to undertake appropriate and effective training. This does not prevent LPAs via their constitutions requiring members to attend training before sitting on the planning committee. One way of approaching the issue of compulsion in training is to identify ''core'' training that members are obliged to attend before they can sit on the planning committee and then require them to notch up a minimum number of hours training per year on other topic areas.

### A Pro–Active Approach to Access to Information

When it comes to access to information in the planning process, the law, public expectations and the mechanism for dealing with access issues have all changed significantly in the past few years. There are, of course, statutory requirements governing access to planning information,[22] but in the light of what is set out below, I would suggest that LPAs should look to go beyond the strict requirements of these legislative provisions in the spirit of promoting openness and transparency.

It should be borne in mind at the outset that there is a strong inherent public interest in promoting access to environmental information. Following the ratification of the Aarhus Convention[23] there is a general recognition that in order to protect the environment it is important for individuals to have access to environmental information so that they are able to participate in environmental decision making and have access to justice.

In terms of the mechanism associated with access to information, the Information Commissioner (ICO) is responsible for enforcement and overseeing the operation of the Freedom of Information Act 2000 (FOIA) and the Environmental Information Regulations 2004 (EIR). The ICO's functions also include educating and influencing behaviour in this field. Importantly, the ICO issues guidance notes on the operation of the two systems which are essential reading for LPAs.

The Information Tribunal (previously called Data Protection Tribunal) was originally set up to hear appeals under the Data Protection Act 1984. It continued to hear appeals after the Data Protection Act 1998 came into effect, but was renamed the Information Tribunal when it also became responsible for hearing other information appeals under the Freedom of Information Act 2000, the Privacy and Electronic Communications Regulations 2003 and the Environmental Information Regulations 2004. It is due to transfer into the General Regulatory Tribunal in 2010. Its decisions are helpful

[22] Notably in the Town and Country Planning (General Development Procedure) Order 1995.

[23] Convention on Access to Information, Public Participation in Decision making and Access to Justice in Environmental Matters adopted on June 25, 1998 in the Danish City of Aarhus.

in understanding how the FOIA and EIR requirements will apply in practice and also inform the guidance notes issued by the ICO.

The operation of the public interest test and the ICO's expectations of how it should be applied help to illustrate the change of emphasis from access to information being an essentially reactive process to one in which LPAs should consider how they can best promote an open culture and actively facilitate access to information.

By way of background, s.2 of the Freedom of Information Act 2000 sets out the circumstances under which a public authority may refuse a request for the disclosure of information. Some exemptions are absolute and the right to know is wholly disapplied (for example information supplied by or relating to bodies dealing with security matters or information covered by parliamentary privilege). However, when it comes to information relating to the planning process qualified exemptions are far more commonplace. In these cases a public authority, having identified a possible exemption, must consider whether the public interest in maintaining the exemption is greater than that in confirming or denying the existence of the information requested and providing the information to the applicant. Some of the exemptions in FOIA are class exemptions and some prejudice based. Class exemptions are designed to give protection to all information falling within a particular category, for instance, information subject to legal professional privilege. Prejudice-based exemptions only come into force if a particular disclosure would prejudice the purpose of the exemption, for instance prejudice to international relations.

The important point to note is that both class and prejudice based exemptions are subject to the public interest test unless FOIA states that they are absolute exemptions. The public interest only needs to be considered where there is an exemption and that exemption is qualified.

Turning to the Environmental Information Regulations reg.12(1)(b) provides that a public authority may refuse to disclose environmental information (under the substantive exemptions) if, ''in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information''. In other words, all of the exemptions (called exceptions in the EIR) save for those concerned with personal privacy, are subject to the public interest test. In the spirit of the Aarhus Convention, the general thrust of the regulations is to provide greater access to environmental information than has been possible previously and by virtue of reg.12(2) public authorities are required to apply a presumption in favour of disclosure. The wide definition of ''environmental information'' means that much of the information held by LPAs will be classified as environmental information.[24]

The ICO's latest guidance on the operation of the public interest test[25] refers to the presumption in favour of disclosure contained in the EIR and suggests that when it comes to the application of the FOIA, openness is, in itself, to be regarded as something which is in the public interest. Factors which it suggests support the disclosure of information include general arguments in favour of

[24] ''....any information in written, visual, aural, electronic or any other material form on—(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements; (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a); (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements; (d) reports on the implementation of environmental legislation; (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);''.

[25] July 2009.

promoting transparency, accountability and participation and the fact that disclosure might enhance the quality of discussions and decision making generally. Turning to factors that the guidance suggests are of no relevance to the application of the public interest test, these include the possibility that the information requested could be misunderstood or regarded as too technical or complex. It follows that if an authority is concerned that information disclosed may be misleading, an appropriate approach would be to offer an explanation or seek to put the information into a proper context rather than simply to withhold it.

It should also be borne in mind that taking the trouble to ''go the extra mile'' when it comes to disseminating information can help avoid problems further down the line. Public mistrust and therefore the risk of decisions being challenged either in the courts or by complaints to the Ombudsman is likely to be fuelled by a perceived lack of candour on the part of the decision making body. With this in mind, whilst the strict legal requirements to give reasons for planning decisions have been enhanced in recent years, minutes of planning committees can still be brief and may not assist greatly with an understanding of how a decision was arrived at. Whilst the Development Forum approach of web casting meetings and putting more detailed transcripts on the LPA's website is likely to be seen as a radical step for many LPAs, it has the benefit of maximising transparency and therefore should be seriously considered.

Legal professional privilege has been mentioned above and it is worth exploring this area in more detail as again it illustrates the change in emphasis when it comes to access to information towards a more pro-active approach.

Section 42 of the FOIA sets out an exemption from the right to know if the information requested is protected by legal professional privilege and this claim to privilege could be maintained in legal proceedings.[26] Legal professional privilege is based on the essential principle that any communication between a client and his/her professional legal adviser will be treated in confidence and not revealed without consent. It protects communications between a professional legal adviser and client from being disclosed, even to a court of law. The term ''professional legal adviser'' includes a number of different types of legally qualified individuals including both external and in-house lawyers.

As indicated above, the legal professional privilege exemption is class based. Accordingly it is assumed that the disclosure of even relatively trivial information might undermine the relationship of the lawyer and client. However, the exemption from the right to know is not absolute, it can only be relied upon where the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Whilst the need to protect the lawyer/client relationship means that legal professional privilege does represent a potent exemption/exception when it comes to access to information, serious consideration still needs to be given to whether access to legal advice should be allowed. For example, where there is sound evidence that the public authority is misleading the public about advice it has received, ignoring advice or acting unlawfully, these may be significant factors favouring the disclosure of advice. This principle was considered by the Information Tribunal in *Boddy v Information Commissioner and North Norfolk DC* (June 2008). In the light of this decision the latest guidance note issued by the ICO dealing with legal professional privilege[27] takes the approach that

[26] In two decisions the Information Tribunal have ruled that reg.12 (5) EIR provides a ''similar'' exception relating to legal professional privilege in the case of environmental information (*Kirkaldie* July 2006 and *Burgess* June 2007).

[27] November 2008.

the more evidence that can be provided which suggests that misrepresentation or unlawful behaviour has occurred, the more weight will attach to this factor.

It is worth noting that when it comes to the planning process, in addition to providing strict legal advice, legal professionals are often involved in contributing to guidance on policy matters, an obvious example being the formulation of local planning policy documents. This input into policy may also be accompanied by advice which can properly be regarded as attracting legal professional privilege and to which access can legitimately be denied having regard to the public interest test. In these circumstances there is merit in seeking to identify and distinguish these two types of information at the outset and to structure advice given in particular cases in order to separate information which may properly be withheld from that which should be accessible to public scrutiny.

It is also worth considering whether there is general legal advice that can be obtained and promulgated to promote public understanding in certain areas. An example of this might be the publication of an opinion on how an LPA intends to approach the question of prematurity as a reason for refusal of planning applications where development plans are under preparation or review.

Finally, turning to other practical measures LPAs can take to actively promote access to information, both access regimes impose positive obligations to disseminate information—via publication schemes in the FOIA and the positive obligation to disseminate in the EIR. In addition, the adoption of protocols setting out how categories of information will be dealt with can assist in public understanding. In addition the ''Concept Statement'' approach adopted by Chelmsford Council is a good example of an LPA adopting a pro-active approach to the key information associated with a site with a view to guiding future planning applications. These involve a short, concise expression of the design approach deemed necessary to obtain the best from a site and to deal with constraints and opportunities and provide informal officer guidance on the possible future development of the site.

## Concluding Thoughts

The pressure on the planning system to deliver is acute. Whilst the Infrastructure Planning Commission is tasked with dealing with the most significant development proposals, LPAs will still be left to handle major and complex schemes. If these are to be dealt with properly members must have a good understanding of the system within which they are operating and also an appreciation at an early stage of the issues that will be relevant to a particular decision. Member training coupled with a structured approach to member involvement in pre-application discussions will assist. At the same time, LPAs should promote an open and transparent approach to access to information in the planning process so that, as far as possible, the public is left in no doubt as to why a particular decision has been arrived at. Accordingly LPAs may wish to consider strategies towards the dissemination of information which are aimed at promoting the understanding of issues rather than focussing on how they should react to individual requests.