

## DECISION ITEM

REPORT OF	MEETING	DATE	ITEM NO
DEVELOPMENT SERVICES DIRECTORATE	COUNCIL	20 JULY 2020	15
<b>PLANNING APPEALS PROTOCOL</b>			

### PUBLIC ITEM

This item is for consideration in the public part of the meeting.

### SUMMARY

At the meeting of the Planning Committee held on 22 January 2020, it was resolved that, subject to the inclusion of an additional footnote to provide further explanation of the different methods that may be followed in the determination of planning appeals, the Committee recommended to the Audit & Standards Committee and Full Council that the Planning Appeals Protocol be incorporated into the Council's Constitution and that the adopted procedures be used in presenting the Council's case to appeals with respect to those decisions made contrary to the recommendation of planning officers.

In line with that resolution, the Audit and Standards Committee at its meeting on 21 May 2020, considered the matter and recommended to Full Council that the Planning Appeals Protocol be incorporated into the Council's Constitution.

### RECOMMENDATION

That Full Council agree to the proposed Planning Appeal Protocol being incorporated into the Council's Constitution and that the adopted procedures be used in presenting the Council's case to appeals with respect to those decisions made contrary to the recommendation of planning officers.

### SUMMARY OF PREVIOUS DECISIONS

Planning Committee – 22 January 2020 - It was RESOLVED that, subject to the inclusion of an additional footnote to provide further explanation of the different methods that may be followed in the determination of planning appeals, the Planning Committee recommend to Audit & Standards Committee and Full Council that the Planning Appeal Protocol be incorporated into the Council's constitution and that the adopted procedures be used in presenting the council's case to appeals with respect to those decisions made contrary to the recommendation of planning officers.

Audit and Standards Committee – 21 May 2020 it was RESOLVED to recommend to Council that the Planning Appeals Protocol be incorporated into the Council's constitution.

### CORPORATE PRIORITIES

Spending your money in the most efficient way to achieve excellent services ( <b>Value for Money</b> )	√
Delivering the services that customers expect of an excellent council ( <b>Clean and Green</b> )	√
Working with all partners ( <b>Vibrant Economy</b> )	
To make sure Fylde continues to be one of the most desirable places to live ( <b>A Great Place to Live</b> )	
Promoting Fylde as a great destination to visit ( <b>A Great Place to Visit</b> )	

## REPORT

1. As part of the Planning Service's continuous improvement programme, it has been noted that the procedures that are followed in circumstances where planning permission is refused by the Planning Committee contrary to officer recommendation or the council's case is altered as a result of supplementary evidence being submitted by an applicant are not as clear as they might be and have never been documented.
2. The Planning Committee considered a proposed protocol that sets out the responsibilities and the procedures that should be followed where:
  - There is a change in circumstances between the determination of a planning application and the determination of any subsequent appeal that warrants a change in the council's case,
  - Council planning officers are unable to represent the Council due to a potential conflict with their professional code of conduct,
  - A local member's view is contrary to that of the council as a whole.
3. The Planning Committee agreed the proposed protocol, which is attached as appendix 1 to this report, with the addition of a note to explain the different processes that are available in determining an appeal. It is intended that the appeal protocol would be read alongside the existing Officer/Member Code of Conduct and the Officer/Member Protocol.
4. The Audit and Standards Committee at its meeting on 21 May 2020 also considered the proposed protocol suggested by the Planning Committee and recommended to Full Council its inclusion within the Constitution as outlined.

IMPLICATIONS	
Finance	The protocol seeks to formalise the current practices of the council and so, the costs associated with the appointment of external consultants to represent the council at such inquiries is not expected to increase and will be met from existing budgets. Where it is not possible to meet these costs from existing budgets, any additional budgetary requirements will be considered on a case by case basis.
Legal	None directly arising from this report.
Community Safety	None directly arising from this report.
Human Rights and Equalities	None directly arising from this report.
Sustainability and Environmental Impact	None directly arising from this report.
Health & Safety and Risk Management	The establishment of a clear protocol will reduce the risk associated with the appeal process in such circumstances and help to ensure that the reputation of the organisation is maintained.

LEAD AUTHOR	CONTACT DETAILS	DATE
Mark Evans	<a href="mailto:mark.evans@fylde.gov.uk">mark.evans@fylde.gov.uk</a>	June 2020

BACKGROUND PAPERS		
Name of document	Date	Where available for inspection
Constitution	2019	<a href="#">Fylde Council Website</a>
Planning Committee Minutes Audit & Standards Committee	22 January 2020 and 21 May 2020	<a href="#">Fylde Council Website</a> (Item 10 refers)

**Attachments** - Appendix 1- (Draft) Planning Appeal Protocol

# **Appendix 1 - (Draft) Planning Appeal Protocol**

## **Background**

The role of planning officers is to **advise** planning committees, who in turn are entitled to reach their own decisions by attaching different weight to the various planning criteria that are relevant to the determination of an application. Planning committees are, therefore, perfectly entitled not to follow the advice of officers. However, the committee must ensure that their decision is based upon sound planning grounds.

In the event that planning permission is refused or granted subject to the imposition of planning conditions that an applicant considers to be unreasonable, the applicant has the right of appeal against the council's decision. Less frequently, a planning inquiry may be held where the council is minded to approve a planning application, but the Secretary of State has invoked his power to 'call in'<sup>1</sup> an application for his own determination. Planning appeals are heard by the Planning Inspectorate which is an independent arm of government

Normally planning officers will prepare and present the council's case in any appeal. There may, however, be occasions when the decision of the council is not in line with the professional judgement of planning officers and in these circumstances the Council's officers are not able to represent the council at an appeal. This is because, at an appeal hearing or inquiry, a planning officer would be both expected by the planning inspector and required by the provisions of the Royal Town Planning Institute's Code of Professional Conduct, to give their professional opinion on the development proposal.

This protocol is intended to provide guidance to officers and members in circumstances where:

- Circumstances change between the determination of the planning application and the determination of the appeal,
- Council planning officers are unable to represent the Council due to potential conflict with their professional code of conduct,
- A local member's view is contrary to that of the council as a whole.

This protocol should be read alongside the Officer/Member Code of Conduct and the Officer/Member Protocol.

## **The Appeal Process**

Appeals may be heard by public inquiry, informal hearing or written representations depending upon the complexity of the case<sup>1</sup>. The decision by which method a particular appeal will be determined is for the Planning Inspectorate to determine, however, before making this decision, the Inspectorate normally consult with interested parties. The council's constitution delegates authority to respond to any such consultations to the Director of Development Services<sup>2</sup>.

In the event that the Committee decision is in line with the officer recommendation, the appeal case will normally be prepared and presented by council planning officers with specialist assistance brought in as necessary (for example, to assist in viability appraisals or specialist retail impact matters).

In these circumstances officers will be acting on behalf of the council and elected members would not be expected to be involved in the detailed preparation or presentation of the council's case.

The appeal process allows interested parties to make their views known to the planning inspector responsible for determining the appeal. If an individual member wishes to make specific comments in regard to an appeal, they may do so as a private individual or as a member of the council.

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<sup>1</sup> S.77 of the Town and Country Planning Act 1990

<sup>2</sup> Para 4.4 Part 3 FBC Constitution – July 2017

## **Changes in Council's case**

The Planning Practice Guidance (PPG) encourages appellants to continue to discuss their proposal with the local planning authority after an appeal has been lodged. As a result of such discussions the application originally considered by the Planning Committee may be amended or additional information may be presented by the appellant that results in one or more reasons for refusal 'falling away' as they are no longer relevant to the council's case.

Such discussions will often take place right up to the opening of the hearing or public inquiry and may even take place alongside the event.

- 1. In circumstances where the evidence indicates that the council's case should be amended, The Head of Planning & Housing (or the Head of Governance, as appropriate) will, following consultation with the Chairman and Vice Chairman of the Planning Committee, notify the Planning Inspectorate and members of the Planning Committee of any amendments to the council's position as soon as practically possible.**

Any individual member who does not agree with the council's amended case will be able to make their own views known to the Inspector.

## **Decision Contrary to Officer Recommendation**

The council's constitution advises that, in making decisions on planning applications and planning matters, *"members should not normally take a decision contrary to the officers' recommendation without adjourning for a few minutes so that the reasons for the proposed decision can be discussed and then agreed by the committee and, where there is concern about the validity of reasons, considering deferring the decision to another meeting to have them tested and discussed"*<sup>3</sup>;

This is a practice that has been followed at Fylde for many years and so should continue. Where the Chairman considers that there is a potential that a decision could be made contrary to recommendation he should raise this possibility at the Chairman's briefing to allow officers time to consider the possible scope of reasons for refusal. Similarly, where a member of the committee has concerns about the suitability of a proposed development, he or she should seek to discuss those concerns with the case officer or senior planning officers ahead of the committee meeting in order that those concerns may be fully considered.

In the event that a decision is made contrary to the advice of planning officers and is then challenged by an appeal, it will usually be necessary for special arrangements to be made regarding that appeal to prevent conflict with the RTPI's Code of Professional Conduct.

## **The Royal Town Planning Institute Code of Professional Conduct**

The RTPI requires that Chartered Town Planners exercise their professional judgement in accordance with the Code of Professional Conduct (the Code)<sup>4</sup>. In particular:

- Members [of the RTPI] must exercise fearlessly and impartially their independent professional judgement to the best of their skill and understanding.
- Members [of the RTPI] must not make or subscribe to any statements or reports which are contrary to their own bona fide professional opinions, nor knowingly enter into any contract or agreement which requires them to do so.

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<sup>3</sup> Para 10.7 – Member/Officer Protocol for Planning

<sup>4</sup> Para 11 & 12 RTPI Code of Professional Conduct – February 2016

In addition to the requirements placed on individual chartered town planners, the Code also requires those members who, as managers, have responsibility for the work of an organisation engaged in planning work, to take all reasonable steps to ensure that planning matters in the organisation or body are conducted in accordance with the Code<sup>5</sup>.

### **Defending Appeals – All methods of determination**

In the event that planning permission is refused, or a planning condition is imposed, contrary to the professional judgement of planning officers, the Code prevents planning officers representing the council at any subsequent planning appeal.

The RTPI Code of Conduct only extends to professional views. Accordingly, the administration of appeals and the presentation of background policy and factual information may still be provided by the planning service. However, in such circumstances the council's appeal case will be overseen by the council's legal team.

**2. In order to avoid any conflict with the RTPI code of conduct, in circumstances where a decision is made contrary to the recommendation of planning officers, appeals will be overseen by the Head of Governance.**

The appeal process includes a significant level of administration as it is important that copies of the planning file on which the council's decision was made are passed to the appellant and the planning Inspectorate. There is also a need to notify those who were informed of the original application, including residents, Parish/Town Councils, and other consultees. The support staff in the Development Management team will undertake this work irrespective of the nature of the decision.

In relation to all three procedures, planning officers will take responsibility for submitting the appeal questionnaire, the statement of case and any other documentation required. However, it is important that these fully and accurately represent the basis of the decision made by members. This will be simpler to achieve if the decision, with reasons, are clearly set out in the minutes.

Planning Inspectorate guidance states:

*"The local planning authority's reasons for refusal should be clear and, where the Committee's decision goes against the planning officer's recommendation, it is good practice for the reasons for this to be stated clearly in the Committee minutes."*

Recent case law suggests that this is more than "good practice" and is a legal requirement, other than where reasons can be inferred from the officer report.

Officers will provide advice and support towards making the best possible case in setting out the council's appeal case.

### **Defending appeals –representations in writing**

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<sup>5</sup> Para 20 RTPI Code of Professional Conduct – February 2016

Most planning appeals are decided by the written representations procedure. With this procedure the Inspector considers written evidence from the appellant, the LPA and anyone else who has an interest in the appeal. The site is also likely to be visited.

In the event that the Planning Inspectorate determines that an appeal will be determined by written representations, the Proposer and Secunder of the motion will be contacted on receipt of the appeal and asked to set out the scope of the case that they wish the council to present on the appeal. Planning Officers will be able to provide the necessary contextual and policy background and will be able to assist members in the format that their statement should take. However, as the RTPI Code of Conduct prevents planning officers from making or subscribing to any statements or reports which are contrary to their own bona fide professional opinions, the responsibility for preparing the statement will rest with members, assisted by the council's legal team.

Officers will draft the Statement of Case under this instruction, and will do so in a timescale that allows a reasonable opportunity for the Chairman, Vice-chairman, Proposer and Secunder to review, suggest amendments, and agree the wording of the Statement before it is submitted. Members will recognize that the Planning Inspectorate works to fixed deadlines and so will need to commit to respond in a timely manner.

### **Defending appeals – representation at inquiries or hearings**

If an appeal is to be determined by way of an informal hearing, the Head of Planning & Housing will consider whether a planning officer can present the Authority's case. If a planning officer is unable to speak with conviction and in support of the decision made by Members the Chairman and Vice Chairman will be notified, as soon as practically possible after the receipt of the appeal. Where officers are not to be involved in leading the appeal, the Head of Governance will discuss alternative approaches with the Chairman of the Planning Committee. In some cases, it may be practical to appoint a planning consultant to present the Council's case. In other cases it may be appropriate for a member or members to present the Council's case. This role could be taken by the Chairman of the Committee or by a member who proposed or seconded the motion. The nature of informal hearings is such that it will rarely be appropriate to appoint a legally qualified advocate to present the Council's case.

If an appeal is to be determined at a public inquiry, the Council will generally have legal representation. However, for reasons explained, it may be difficult for officers to give evidence on planning merits where the decision is against their recommendation. Again, the options are calling on a planning consultant to give evidence or calling on the Chairman or other members.

If members are to be called as witnesses, officers will give them all reasonable support. Officers will arrange a meeting with the members involved to offer guidance and support, go through the planning application and inquiry procedure in detail and answer any queries or concerns that Members may have. At the hearing itself, members will be accompanied by a legal or planning officer.

**3. Where planning officers are not to be involved in leading the appeal, the Head of Governance will discuss alternative approaches with the Chairman of the Planning Committee. The decision whether to appoint external consultants to present the council's case will be made by the Head of Governance following consultation with the Chairman of the Planning Committee.**

In order to ensure the council is able to meet the tight deadlines imposed by the appeals process and to ensure compliance with the council's procurement rules, a list of approved consultants who have been pre-vetted will be maintained. In the event that it is necessary to appoint a consultant to represent the council at an appeal, each individual or company on the agreed list will be approached to establish whether they are able to represent the council. In the event that interest is shown by more than one company, the decision regarding which company to use will rest with the council's Head of Governance having regard to cost and quality as set out in Fylde Council's 'Guide to Buying for the Council'.

**4. An approved list of planning consultants will be maintained by the council. In the event that it is necessary to appoint a consultant to represent the council at an appeal, each individual or company on the agreed list will be approached to establish whether they are able to represent the council. The decision regarding which company to use will rest with the council's Head of Governance having regard to cost and quality.**

If members are to present the Council's case, officers will give them all reasonable assistance. Prior to the date of the hearing, officers will arrange a meeting with the members involved to offer guidance and support, go through the planning application in detail and answer any queries or concerns that Members may have. At the hearing itself, Members will be accompanied by either a legal officer, planning officer or a planning consultant, although it must be noted that the planning officer will not be able to make representations in regard to the merits of the council's case at the hearing,

**5. Planning officer support will relate to procedural matters and to resisting any application for costs, with advice to members on technical and policy matters if the need arises. Planning officers will not give evidence on the merits of the case. Officers, or a planning consultant, will also accompany members on any site visit that the Inspector may wish to make.**

### **Defending appeals in difficult cases**

Whilst officers fully respect the role and responsibility of elected members in the decision making process, there may be occasions when the prospects of success are so bleak that the better course would be not to defend an appeal. The costs of defending an appeal can be substantial, and members and officers need to pay heed to the risk of an adverse award of costs.

The Planning Inspectorate has published detailed guidance on when an award of costs against a local authority may be appropriate<sup>6</sup>. Examples given include:

- preventing or delaying development which should clearly be permitted, having regard to its accordance with the development plan, national policy and any other material considerations.
- failure to produce evidence to substantiate each reason for refusal on appeal
- vague, generalised or inaccurate assertions about a proposal's impact, which are unsupported by any objective analysis.

**6. If officers' professional view is that appeals should not be defended, whether by reason of potential costs or otherwise, they are obliged to give their professional advice and recommendation, and the Planning Committee would be invited to make a decision, if necessary at a special meeting of the Planning Committee.**

It is likely that reports to members in these circumstances would be taken as "Part 2" items, and that any consultation would be on a confidential basis, to avoid prejudicing the Council's position should members nevertheless decide to defend the appeal.

This issue is not necessarily confined to occasions on which members have made a determination against officer advice.

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<sup>6</sup> [www.gov.uk/claim-planning-appeal-costs](http://www.gov.uk/claim-planning-appeal-costs)

## **Individual Member View Contrary to that of the Council**

When an appeal is lodged, members who represent that ward are notified of the appeal by email. This allows them to make individual representations should they wish.

There may be circumstances where the opinions of an individual councilor are at variance with the decision of the council.

**7. In circumstances where a member's view differs to that of the council and he or she wishes their individual views to be taken into consideration by a planning inspector, they may do so in writing or by appearing at an informal hearing or public inquiry. Whilst council planning officers will be able to provide advice or guidance to individual members, they will not be able to divulge information relating to the council's case that is not available to the general public.**

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<sup>i</sup> Appeals may be determined by one of three processes: written representations, informal hearings or public inquiries

### **Written representations**

This is the method used for the determination of the majority of planning appeals. In this type of appeal, the inspector reaches a decision based on written submissions from the applicant, the local planning authority and any objectors. A simplified method is used for the determination of applications relating to householder development (residential extensions), advertisements and minor commercial (shop front) appeals.

### **Informal hearings**

If an informal hearing is called, evidence for and against the development is given orally, but in a less formal setting than at a public inquiry, with the inspector leading a round table discussion to consider the merits of the proposal.

### **Public inquiries**

These are the most formal and adversarial of the three options. Over the course of an inquiry, the inspector takes oral evidence from anyone with a vested interest in the development, or who wishes to express a view. The inspector also takes any written submissions into account when making the final decision.