

PROPRIETY GUIDANCE FOR DEVELOPMENT & PLANNING AUTHORITY MEMBERS

The Guidance

1. This guidance outlines matters relevant to propriety when taking part in Open Planning Meetings i.e. Development & Planning Authority Meetings open to the public at which decisions on planning applications are made. It sets out general guidance on propriety issues but cannot give definitive advice on the correct approach in particular circumstances. This is because relevant caselaw turns on an assessment by the court of the particular circumstances including what was said and done. Familiarity with the principles outlined in this guidance is important to ensure that the decision making process is fair, and seen to be fair, that decisions are made in accordance with the law and are less vulnerable to successful legal challenge.
2. The guidance draws on principles from English and Jersey caselaw and guidance as there is no directly relevant Guernsey caselaw. Such English caselaw is based on the role of English local authority councillors who sit on the local authority planning committee which is analogous to that of Guernsey deputies who are Development & Planning Authority Members but is not exactly the same. The English courts have sought to recognise that councillors have a different role from court judges or Tribunal members so that there must be some leeway for them to both determine planning applications and fulfil their roles as elected, political representatives involved in policy formulation. It seems likely that the Guernsey courts would find the English cases persuasive but these matters have not yet come before the Guernsey courts.
3. The guidance contains provisions relating to public speaking at Open Planning Meetings.

What are the legal risks?

4. The main legal risks that may arise from the way in which the Authority conducts, or appears to conduct, itself from pre-application discussions to a decision are -
 - a. actual or apparent bias, or
 - b. pre-determination i.e. the Authority, or a member, has not properly applied itself/itself to considering all relevant planning considerations or has considered irrelevant considerations and has pre-determined the decision irrespective of the merits of arguments put to the Authority; such a pre-determination can also arise because of a bias towards a particular view.
5. This is in addition to any challenge which may arise based on the reasoning in the decision itself.

6. A statutory appeal by an applicant to the Planning Tribunal under the 2005 Planning Law or an application for judicial review of a decision to the Royal Court, for example, by a group representing local objectors may be made on the basis of actual or apparent bias or pre-determination.
7. The legal risks exist from the opening of any pre-application discussions, or possibly even earlier where a major application is anticipated, until determination by the Authority. There is nothing special about an open planning meeting except that anything stated will be witnessed by the public, and possibly the media, and recorded in the independent written note kept of the meeting. Therefore, there is more potential for the conduct and statements of Authority Members to be scrutinised and allegations of bias, apparent bias or pre-determination made on the basis of what was said or done.

Codes of Conduct and Rules applying to all States Committee Meetings

8. Code of Conduct for Members of the States of Deliberation – Authority Members are subject to the Code of Conduct for States Members at all times when carrying out States Business including determining planning applications. Obvious cases of bias, such as making a decision based on an undeclared personal interest, or the acceptance of a bribe to grant a planning application would be contrary to the Code and may amount to an offence under the Prevention of Corruption (Bailiwick of Guernsey) Law, 2003.
9. Civil Service Code and RTPI Code of Conduct - Any Civil Servants attending the meeting must comply with the Civil Service Code core values of integrity, honesty, objectivity and impartiality. Planners are also members of the Royal Town Planning Institute and will seek to comply with that body's code of conduct which incorporates similar values and requires them to fearlessly and impartially exercise their independent professional judgment to the best of their skill and understanding.
10. Operation of Open Planning Meeting - An open planning meeting is a Development & Planning Authority Meeting and will be subject to the usual rules for such meetings including those relating to -
 - a. declarations of any direct or special interest in a particular planning application so that the member must withdraw from the meeting when that particular application is to be considered. Normally such a direct or special interest will have been identified before the meeting and the relevant member not sent the papers relating to the relevant application, and
 - b. the keeping of an independent record of decisions made at meetings.
11. Protocol for Open Planning Meetings - It is important that the Protocol for open planning Meetings is followed as this will assist in ensuring a fair and orderly procedure and reduce the risk of actual or perceived bias or pre-determination or of the procedure being, or appearing to be, unfair. The Protocol will ensure that all parties have had the same time to comment on documents submitted to the Authority. The Protocol also covers public speaking at an Open Planning Meeting, including:

- a. who is allowed to speak (including the applicant, supporters and objectors),
- b. ensuring objectors and advocates of the development have the same time to speak, and
- c. communications with the Authority during open meetings - this would only be through the scheme for public speaking to avoid any appearance of bias by passing of private notes etc.

12. It is also important that the conduct of meetings appears fair and unbiased e.g. no apparent hostility is shown to a particular group or view. Documents should not normally be circulated at the meeting which have not been previously submitted to the Authority as the members will not have had a chance to consider them or other parties to respond. If additional documents are submitted the Authority should consider whether they contain additional relevant material which needs to be considered and circulated to all parties prior to a decision being made so that the decision would have to be deferred.
13. Passing of messages to Authority Members should be avoided so that it is clear that the Members are only considering the circulated papers and that there is no scope for allegations of bias or external influence on Authority members.
14. Compliance with the above codes, rules and protocols will assist in preventing obvious bias or unfairness occurring. This guidance does not concentrate on obvious cases where it is clear that an Authority member must not take part in the decision such as where it is an application made by themselves/a close family member, or relates to a development in which they/a close family member has a financial interest or is an owner but on how to avoid apparent bias or pre-determination in other less obvious cases.

Not closing one's mind or appearing to do the same

15. The golden rule to avoiding pre-determination, or the appearance of the same, is not doing or saying anything which would suggest that one's mind is shut and that the decision has been made without considering all the relevant planning considerations and representations on such matters. This is subject in Guernsey to a proviso where an application is in respect of a development which is more than a minor departure from the Plan. In such a case there is no need for the Authority to go on to consider the other material planning considerations - see paragraph 26.
16. By the Open Planning Meeting, Authority Members will have read the Planning Officer's report and application papers; in a bigger case, they may have attended earlier public meetings. It is likely that by the time of the meeting they will be pre-disposed to a particular view in many cases along the lines of the planning officer's recommendation. However, members should avoid making statements at any time prior to the decision, before all points have been discussed and all representations have been heard, that might indicate that they have already made up their minds and are not open to consider the merits of points that will be discussed or oral representations that will be made at the meeting.

17. Difference between pre-determination and pre-disposition - where an application has been before the Authority for some time and/or been the subject of earlier public meetings, an Authority member may be pressed for a view on whether they are in favour of granting or refusing it. If a member of the Authority wants to give their view, there is English case law which indicates that a decision maker will not be pre-determined but only pre-disposed if they indicate that, on the basis of what they have heard so far, they are minded to approve/reject the application but their mind is open to the additional representations which are to be made. It is crucial that such a statement is supported by subsequent conduct i.e. the Authority does then go on to hear and consider further arguments and any oral representations at the meeting.

Particular practical issues that may arise

18. An application concerns a development that is likely to have an adverse impact on a district which an Authority member represents; in their capacity as Deputy they have received representations from people in that district either for or against the application. Can they take part in the decision?

A. Yes, providing they have not represented those views i.e. they have not made a statement for or against the application in a way which demonstrates their mind is made up or pre-determined.

Under the Code of Conduct a States Member has a special duty to be accessible to the people of the electoral district for which they have been elected and to represent their interests conscientiously. If a member decides to represent those views, they cannot then take part and vote in the Open Planning meeting as their view would be pre-determined either for or against the development.

The safest course would be for a member to refer the representations to another Deputy for their district so as to preserve their impartiality as a member of the Development & Planning Authority. If another Deputy will not represent those views the Deputy is in a difficult position in view of their duty to their electorate; there is English propriety guidance which indicates that they could still attend the Open Planning Meeting, sitting as a member of the public, to represent those views as any other objector/supporter and then leave the meeting once they have spoken so as to avoid any perception that their views might prejudice other Authority members. There is obviously a risk in such a case that there could be allegations of bias because of the possible influence of the member on other Authority members.

19. A member is also a member of a Douzaine that is in favour/against a particular development or has a vested interest in it e.g. as applicant. Can the member take part in the decision?

A. A member should declare their interest and not take part in the decision if the parish has a vested interest in an application (e.g. it owns the land, is the applicant or has a significant financial interest in the development).

If an application is one on which the parish has publically supported or opposed then there may be allegations of bias or undue influence if an Authority member has taken a prominent role as a parochial officer in putting forward the view of the parish. In such a case it would be safer for them to declare their membership of the Douzaine and not to take part in the decision.

Where the parish has been consulted on an application by the Authority then to avoid allegations of bias or undue influence the safer approach would be for the member not to take a prominent role in dealing with the response to the Authority e.g. by signing the comments on behalf of the Douzaine.

If a member were asked to contribute, as a parochial officer, to a consultation response to the Authority, English propriety guidance in relation to the role of parish councillors who are also on the local planning authority, suggests that this would not be enough on its own to amount to bias or pre-determination providing that the member made it clear to the Douzaine that in expressing a view they are giving it on the information available at the time and that they must reserve a final judgment, in their role as a member of the Development & Planning Authority, to when the full material comes before the Authority having considered all relevant planning considerations and not just those relevant to the parish.

The member should also then declare their membership of the Douzaine at the Development & Planning Authority meeting where those views are considered and the fact that they have reserved their final judgment to when all material has been considered by the Authority. This is distinct from declaring a direct or special interest in the application as referred to in the States Committee rules which would mean that the member would not be sent Agenda papers and would withdraw whilst the application was considered.

20. Can Authority Members be members of charities or other non-governmental organisations that may have an interest in development? e.g. membership of the Société Guernesiate, Guernsey National Trust, Chamber of Commerce etc.

A. Authority Members may decide that the simplest course is to avoid membership of such bodies to avoid any appearance of bias. However, this may not always be desirable or practical and UK caselaw suggests that mere ordinary membership of such an organisation is not enough on its own to amount to bias unless it is an organisation primarily concerned with promoting or opposing development. There is a risk of bias, or an appearance of bias, if the member has said something which

indicates they feel themselves bound by the views of that body or if they have acted significantly for that other body in advocating/opposing a particular development.

A member should declare their interest and not take part in the decision if the body has a vested interest in an application (e.g. it owns the land, is the applicant or has a significant financial interest in the development).

Some bodies, such as the Société, are routinely consulted by the Authority on certain categories of planning applications. In this context there could be allegations of bias or undue influence if an Authority member were that body's spokesperson on development in general or led that body's responses to the Authority.

If a member were asked to contribute to a consultation response to the Authority, English propriety guidance suggests that this would not be enough to amount to bias or pre-determination providing that the member made it clear to the body that in expressing a view they are giving it on the information available at the time and that they must reserve a final judgment to when the full material comes before the Authority having considered all relevant planning considerations.

The member should also then declare their membership of the body at the Development & Planning Authority meeting where those views are considered and the fact that they have reserved their final judgment to when all material has been considered by the Authority. This is distinct from declaring a direct or special interest in the application as referred to in the States Committee rules which would mean that the member would not be sent Agenda papers and would withdraw whilst the application was considered.

The safest course may be for members to avoid taking part in such consultations as members of other bodies.

21. Are there any special considerations which apply when the Authority is considering an application made by another States' committee or which is effectively States' development?

A. It is important that the Authority treats the application in the same way as any other, the process is open and fair and no favouritism is shown to the applicant. There may be public opposition to large, States' sponsored development and opponents will be particularly live to issues of possible bias and pre-determination. Under English case law a local planning authority has a duty to act scrupulously carefully when determining its own applications and it seems likely that the Guernsey courts would adopt this approach.

It is important that the decision is made having regard to relevant planning considerations, in particular the policies of the relevant Development Plan, and not other issues such as States' support of the project or financial considerations which are not relevant to relevant policies of the Development Plan. A decision would be quashed, if the court were to decide, looking at the determination of the application as a whole, that the Authority had determined in advance to allow the application. The issues in paragraph 22 may also be relevant.

22. Can a member participate in the decision where they are also a member of another committee or states body which is applying for or advocating the development?

A. This depends on the circumstances. The safest approach is likely to be for the Authority member not to participate in the decision where the other committee is the applicant. Where the other committee is advocating the development e.g. on States' land, but the applicant is another person, the member should not take part in the decision if they have been involved significantly in advocating the proposal through their role on the other Committee/group. This could give rise to a perceived bias or that the member will not be able to determine the application purely on the planning merits. In a Guernsey context there are relatively few Committee members so it is more likely that there could have been some significant prior involvement through acting on the other Committee etc.

23. Can a member participate in relation to a development on which they have had a prior manifesto policy for or against that development?

A. There is a significant risk that this could fuel allegations of apparent bias or pre-determination. However, if a member has only had a manifesto policy and not represented views for or against a development or indicated that their mind is made up on the development then English caselaw indicates that simply having had a manifesto policy need not exclude a member from taking part in a subsequent decision providing that it is clear from what they say, and what the Authority does, that the member's mind is open to considering all relevant planning considerations and that they go on to do so.

24. A planning application is made in which a States Deputy or his close family member has a financial or ownership interest. A member of the Authority is a friend, business associate or frequently meets with that other Deputy. Can the member take part in the decision?

A. This kind of situation could arise commonly in a small island and it is likely that all members would have some acquaintance with the Deputy; they cannot all exclude themselves. However, if the application is suitable in other ways, it may be a case which should be considered for determination by a planning officer on behalf of the Authority to avoid any appearance of bias. This would, however, mean that the case would not be determined in public.

The Authority should look at the particular situation and assess the risk of an appearance of bias. If the business or friendship is close then the safest course would be to declare an interest and not take part in the decision. In other cases it would be necessary to assess whether the contact went beyond that which would be normal between two Deputies such that there could be a perception of bias on the part of the public. There would be need for particular vigilance if the circumstances might suggest bias e.g. the application was one in which officers had recommended refusal and a member minded to reject the officer recommendation had a closer than normal association with the other Deputy.

25. Can Authority members participate in a decision having previously participated in a States' debate on a matter relating to the same development?

A. Authority members may feel that the safest course, especially where the development is major or controversial and the risk of a legal challenge is high, is to abstain from the vote in the States, particularly when an application is already before the Authority or when pre-application discussions have commenced.

However, there is English case law to support the view that such prior participation in a States' debate would not itself amount to a predetermination providing that members were careful in any debate not to appear to have closed minds and not be prepared to take into account subsequent relevant representations. A statement to this effect could assist in clarifying the position of Authority members but the subsequent conduct of the planning officers and the Authority in hearing and considering relevant representations would have to reflect any statement.

Providing that this guidance is followed the English caselaw suggests that members could indicate that they were pre-disposed to a particular view (a vote for or against a project might amount to a pre-disposition) providing that they did not close their minds or appear to do so by anything said or done. In such a case, however, there is obviously an enhanced risk that a person will seek to challenge a decision on the basis of pre-determination or apparent bias.

26. The application is for development which is contrary to the Development Plan and the grant of which would involve more than a minor departure from the Plan; will the Authority be closing their minds if they don't go on to consider other relevant planning considerations?

A. No. Under the Land Planning and Development (General Provisions) Ordinance, 2007, the Authority must refuse an application if the development in respect of which it is made would involve more than a minor departure from the Development Plan and it need not take into account any other material planning considerations.

In some cases, there may be some discussion as to whether or not the departure is minor. If this point is unclear, there is nothing in the Law to prevent the Authority considering other relevant planning considerations but the Authority must refuse the application if the departure is more than minor and so a view must be reached on this point.

Where an application is for development which does not involve a departure from the Development Plan or the Authority, upon request from the applicant, has decided it can exercise its discretion to grant the application as a minor departure, the Authority must consider all relevant planning material considerations and the decision could be subject to challenge on this basis if it does not do so.

27. Disagreeing with a planning officer's recommendation

It is open to the Authority to disagree with the recommendation of the planning officer in relation to a particular case but any such disagreement must be on the basis of relevant material considerations.

It is important that clear reasons are given for any planning decision so where Authority Members decide not to accept an officer recommendation they must take special care to ensure that clear reasons are given for such disagreement and their decision.

If there is any lack of clarity as to reasons for refusing to follow an officer's recommendation it would, therefore, be advisable to consider adjourning a final determination until another meeting so that the reasons can be finalised properly.

Where an officer's recommendation is for refusal because the proposal is more than a minor departure from the Development Plan, members must be satisfied, if they are minded to grant permission, that there is no departure or it is only minor. This is because under section 12 of the Land Planning and Development (General Provisions) Ordinance, 2007 the Authority must refuse an application if it would involve more than a minor departure from the Plan. The applicant must have made a written request to the Authority requesting the application to be granted as a minor departure.

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