



Signed off by	Deputy Monitoring Officer
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To	Council
Date	Thursday, 21 September 2023
Executive Member	Deputy Leader and Portfolio Holder for Finance, Governance and Organisation

Key Decision Required	No
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Subject	Constitution update: Executive Members on Planning
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Recommendations
<p>That the constitution be amended to allow Executive Members to sit on the Planning Committee, excluding –</p> <ul style="list-style-type: none"> i. The Leader of the Council; ii. The Executive Member with responsibility for Planning Policy; and, iii. Executive Members appointed to any committee, sub-committee, or position with responsibility either: <ul style="list-style-type: none"> a. To consider and take decisions with regard to the potential establishment of commercial ventures and the undertaking of other investment activities by the Council; or, b. To exercise the function of the Council as a shareholder or partner, in relation to companies, partnerships or other commercial entities owned or part owned by the Council.
Reasons for Recommendations

A request to amend the constitution has been received from Councillors Parnall and Walsh. The request seeks to remove a constitutional restriction on Executive Members sitting on the Planning Committee.

In view of the risk management implications detailed under paragraphs 54 to 58, an amendment to the existing provision (option 2, as detailed under paragraph 44) is recommended as a suitable compromise which allows greater flexibility in the membership whilst protecting the integrity of the Council's decision-making process.

Executive Summary

A request to amend the constitution has been received from Councillors Parnall and Walsh. The request seeks to remove a constitutional restriction on Executive Members sitting on the Planning Committee.

The current restriction against Executive Members sitting on the Planning Committee was introduced to the Constitution as part of a review by the Governance Task Group in 2019. The recommendation of the Governance Task Group in 2019 was made in anticipation of a significant increase in commercial business by the local authority's companies, which would subsequently require frequent shareholder decisions by Executive Members; and, this restriction was considered an appropriate mechanism to manage conflicts of interest that would otherwise likely arise.

The proposal therefore requires Members to consider whether a blanket prohibition on Executive Members from sitting on the Planning Committee is an appropriate mechanism for managing conflicts of interest (and the associated risks of apparent bias and predetermination); and, if the risk presented by future conflicts of interest can be adequately managed via other means if this restriction was removed.

Following consultation with the Planning Committee, Group Leaders and senior officers, this request is now put to the Full Council for determination.

Full Council has authority to approve the above recommendations

Statutory Powers

1. The Localism Act 2011 provides for the Council's Code of Conduct to deal with potential conflicts caused by a member's personal interests (non-pecuniary interests); and discretion over some of the actions a Member should take when faced with conflicts of interest.

Background

Details of the request

2. Councillors Parnall and Walsh submitted a constitution change request to the Monitoring Officer during the 2022-23 municipal year seeking to remove the restriction on Executive Members from sitting on the Planning Committee.
3. The reason provided in the request by Councillors Parnall and Walsh is as follows –
 - i. The removal of this restriction will increase the shortlist from which Members and substitute Planning Committee Members may be drawn.*

This will help improve the quality of the decision-making, particularly when substitute Members are required, as:

- a. In view of the large size of the Committee (15 Members, representing one Member from each ward of the borough), the exclusion of Executive Members means that in some cases, if a Committee Member was unavailable and their fellow ward Member(s) included an Executive Member, they may not be able to appoint a substitute from their ward, leading to a loss of representation of that ward on the committee.*
- b. Several Members have observed, both introspectively and anecdotally of others on the Committee, that sometimes Members, and in particular substitute Members, lack the confidence and training to fully participate in the debate and / or routinely abstain during the voting at the Planning Committee. This is highlighted immediately after the elections, when newly elected Members are appointed to sit on the Committee. This could be addressed in part if more experienced Executive (excluding those with an inherent conflict of interest), who may be better equipped to contribute to the debate and make informed decisions, were able to sit on the Committee.*

Why the restriction was introduced

4. The restriction on Executive Members sitting on the Planning Committee was added to the Constitution following the governance review in May 2019. This restriction originated from a recommendation by the Governance Task Group to the Executive at its meeting on 18 March 2019:

“Recommendation 5 - That Members of the Executive be not allowed to be members or substitutes of the Planning Committee and that the Constitution be amended to reflect this.”

5. The rationale for this change was provided in the report of the Governance Task Group to the Executive on 18 March 2019 as follows:
 - i. “The planning process should leave no grounds for suggesting that a decision has been partial, biased or not well founded in any way” (paragraph 31).
 - ii. “That Executive Members had an increased possibility of a conflict of interest in considering matters before the Committee and that it would be better if the convention (of not appointing Executive Members) be confirmed in the Constitution” (paragraph 37).
 - iii. “An Internal Audit Report from September 2017 in relation to the Council’s Planning Decision Approval Process, was also considered. This highlighted the importance of demonstrating transparency and negating conflicts of interests in relation to Members of the Executive that was increasingly involving property or commercial investment related decisions” (paragraph 39).

Key considerations

6. The recommendation of the Governance Task Group in 2019 was made in anticipation of a significant increase in commercial business by the local authority's companies, which would subsequently require frequent shareholder decisions by Executive Members; and, this restriction was considered an appropriate mechanism to manage conflicts of interest that would otherwise likely arise.
7. The proposal therefore requires Members to consider whether a blanket prohibition on Executive Members from sitting on the Planning Committee is an appropriate mechanism for managing conflicts of interest (and the associated risks of apparent bias and predetermination); and, if the risk presented by future conflicts of interest can be adequately managed via other means if this restriction was removed.
8. In respect of the reasons given for the original request under paragraphs 3.i.a - 3.i.b above, it is worth noting the following points –

Paragraph	Reason given	Officer response
3.i.a.	In view of the large size of the Committee (15 Members , representing one Member from each ward of the borough), the exclusion of Executive Members means that in some cases, if a Committee Member was unavailable and their fellow ward Member(s) included an Executive Member, they may not be able to appoint a substitute from their ward, leading to a loss of representation of that ward on the committee.	<p>There is no legal requirement for each ward to be represented on the membership of the Planning Committee.</p> <p>This is a matter of local choice that was last considered by the Council during its Governance review in 2019.</p> <p>Ward Members' views (including Executive Members) may also be represented as visiting Members, rather than as Members of the committee.</p> <p>If the underlying cause for this request concerns greater flexibility in the selection of substitutes, then an alternative solution could be to review the size of the Planning Committee.</p>
3.i.b.	Members lack the confidence and training to fully participate in the debate and / or routinely abstain during the voting at the Planning Committee. This is highlighted immediately after the elections, when newly elected Members are appointed to sit on the Committee. This could be addressed in part if more experienced Executive (excluding those with an	<p>This reason is based on anecdotal evidence which therefore limits its usefulness in forming a case for change.</p> <p>Members of the Planning Committee are required to attend mandatory training on decision-making in the Planning Committee.</p> <p>If there are concerns about Members' confidence in performing their role effectively, then this would</p>

inherent conflict of interest), who may be better equipped to contribute to the debate and make informed decisions, were able to sit on the Committee

be best addressed via additional training.
This will be considered by Group Leaders in consultation with Democratic Services for the next municipal year.

Key Information

Legislative and constitutional context

9. The importance of managing conflicts of interest is enshrined in 1.2 of the Nolan Principles of Public Life, concerning integrity –

“Holders of public office... should not act or take decisions in order to gain financial or other material benefits for themselves, their family, or their friends. They must declare and resolve any interests and relationships.”
10. Since the Nolan Principles were introduced in 1998, the Localism Act 2011 placed a personal duty on elected Members to register, declare, and manage their interests when they are acting as decision-makers, to protect the integrity of decision-making in local government.
 - i. From the Member’s point of view, failure to resolve a conflict between their personal interest and the public interest may result in public censure at the least and a criminal conviction at the worst.
 - ii. From the Council’s point of view, if a decision is made in the face of a conflict between the council’s obligation to act in the public interest and the individual decision-maker’s personal interest, then the resulting decision is at risk of legal challenge.
11. If a decision maker has predetermined their position, or if there is apparent bias, they should withdraw from being a member of the decision-making body for that matter, in order to protect the integrity of the decision-making process.
12. In respect of the Planning Committee (representing the functions of the local planning authority), a Member’s appointment as an Executive Member for the Council does not represent a disclosable pecuniary interest under the Localism Act 2011. It does, however, as detailed below, represent a personal interest which should be managed to mitigate the risks of apparent bias or predetermination.
13. Planning issues must be considered fairly and on their planning merits, even when there is a predisposition in favour of one side of the argument or the other. Avoiding bias and predetermination and the perception of it is essential. The decision-making process must be seen to be fair and impartial from the perspective of an external observer.

Predetermination

14. Predetermination occurs where someone has a closed mind, with the effect that they are unable to apply their judgment fully and properly to an issue requiring a decision.¹
15. Predisposition occurs where someone remains open to listening to all the arguments and changing their mind, considering all the information presented at the meeting.
16. A distinction must therefore be made between “predetermination”, which is unlawful, and “predisposition”, which is not. Councillors will legitimately have firm views about issues which they have to decide, and will have expressed those views, and this should be allowed.
17. Therefore, a councillor who has campaigned on an issue or made public statements about council business may be able to participate in discussion of that issue in the council and to vote on it, provided that they have not predetermined themselves.
18. A test for distinguishing between predisposition and predetermination is that a member of the public, with knowledge of the relevant facts, would reasonably regard the interest as so significant that it is likely to prejudice your discussion or decision-making in relation to that matter.

Conflicts of interest under the Council’s Code of Conduct

19. The Localism Act 2011 provides for the Council’s Code of Conduct to deal with potential conflicts caused by a member’s personal interests (non-pecuniary interests); and discretion over some of the actions a Member should take when faced with conflicts of interest.
20. The Council’s current Code of Conduct defines personal interests as –
 - “3) *You have a personal interest in any business of your authority where either*
 - - a) *It relates to or is likely to affect –*
 - i. *any body of which you are a Member or in a position of general control or management and to which you are appointed or nominated by your authority*
 - ii. *any body –*
 - a) *exercising functions of a public nature*
 - b) *directed to charitable purposes; or*
 - c) *one of whose principal purposes includes the influence of public opinion or policy (including any political party or trade union)*
 - *of which you are a member or are in a position of general control or management*
 - iii. *the interests of any person from whom you have received a gift or hospitality with an estimated value of at least £25; or*

¹ Localism Act 2011 c. 20, Explanatory Notes, Commentary, Part 1, Chapter 6.

b) a decision in relation to that business might reasonably be regarded as affecting your wellbeing or financial position or the wellbeing or financial position of a 'relevant person' to a greater extent than the majority of other council tax payers, ratepayers or inhabitants of the Ward, affected by the decision.

4) A relevant person is –

a) a member of your family or a close associate; or

b) any person or body who employs or has appointed such persons, any firm in which they are a partner, or any company of which they are directors;

c) any person or body in whom such persons have a beneficial interest in a class of securities exceeding the nominal value of £25,000; or d) any body of a type described in paragraph 3 a i) or ii)

21. Membership of the Executive is therefore defined as a personal interest under 3.a.i., as the Executive is appointed by the Leader on behalf of the Council to direct strategy and policy, the interests of whom are distinct and separate from those of the local planning authority (represented by the Planning Committee).
22. The interests of the Executive vs. Planning Committee will not ordinarily conflict, as the majority of applications referred to the Planning Committee are submitted by members of the public. However, a conflict of interest (which carries the risks of apparent bias and predetermination) will likely arise when the relevant Member of the Executive has responsibility for, or has voted in support of (either in terms of Executive funding, or as a Council shareholder representative) a Council or Council-owned company planning application.
23. Taking this into account, whilst membership of the Executive does not in of itself present an inherent conflict of interest with membership of the Planning Committee, the level of risk presented by relevant conflicts of interest between these two very distinct functions will vary depending on the individual Member's role and remit (e.g. their portfolio), the frequency of relevant business where there is likely to be a conflict, and the circumstances of the relevant item(s) of business to be determined.
24. The extent of that risk, and how those risks should be managed, is detailed in the next section.

Managing personal interests and apparent bias

25. An interest needs to be managed only where it is reasonable to suppose that an individual's participation in a discussion or decision could be unduly influenced by a particular relationship or personal interest (i.e. they would be biased or predetermined).
26. With this in mind, the test for establishing apparent bias (referred to below as a "prejudicial interest") is set out in the Council's Code of Conduct as follows –

"where you have a personal interest in any business of your authority, you also have a prejudicial interest in that business where either:

a) the interest is a disclosable pecuniary interest...; or

b) the interest is one which a member of the public with knowledge of the relevant facts would reasonably regard as so significant that it is likely to prejudice your judgment of the public interest.”

- 27.** How an interest should be managed depends on three factors:
- i. the degree of involvement of the individual in the decision or discussion;
 - ii. how directly related the interest or relationship is to the decision or discussion in question; and
 - iii. how significant the interest or relationship is to the individual.
- 28.** Where these factors are minor, (e.g. they do not present any risk of apparent bias or predetermination) then simply declaring the interest may be sufficient.
- 29.** Where the factors are significant, the Council’s Code of Conduct prescribes the effect of a prejudicial interest as follows –
- “where you have a prejudicial interest in any matter in relation to the business of the authority –*
- a) you must not participate, or participate further, in any discussion of the matter at any meeting, or participate in any vote, taken on the matter at the meeting and must withdraw from the room or chamber where the meeting considering the matter is being held*
 - i) in a case where paragraph 2 below applies, immediately after making representations, answering questions or giving evidence;*
 - ii) in any other case, whenever it becomes apparent that the matter is being considered at that meeting; unless you have obtained a written dispensation from the Monitoring Officer or Standards Committee*
 - b) you must not exercise Executive functions in relation to that matter; and*
 - c) you must not seek improperly to influence a decision about that matter.”*

Scenario 1: Ordinary Executive Member

- 30.** Therefore, an Executive Member who is responsible for, or has voted as an Executive Member in favour of, an action, policy or strategy, by the Executive which is directly related to an application to be determined by the Planning Committee –
- i. Has a personal interest in respect of that item, as defined under 2.1 (3)(a)(i) of the Council’s Code of Conduct, as –
 - a. they are an Executive Member of the Council; and,
 - b. their actions or responsibilities as an Executive Member may affect their judgement as a member of the Planning Committee, representing the local planning authority (not the Council).
 - ii. This personal interest, when applied against the test outlined in paragraph 26, could reasonably be considered by an informed bystander to prejudice

their judgement of the public interest, and would therefore represent a “prejudicial interest” as defined under the Council’s Code of Conduct.

31. In this scenario, the relevant Executive Member must not participate in the debate or vote on the relevant item; however, they may be allowed to make a representation, answer questions, or give evidence.

Scenario 2: Local Authority Company Non-Executive Director

32. If a council officer or a councillor is a director of a limited company jointly-owned by the council, they will have fiduciary duties which have the potential to conflict with the interests of the council. Such conflicts may also arise the other way around, when the council has to make decisions (e.g. Planning decisions) about a company in which it has a significant interest.
33. In this scenario, a reasonable member of public would likely conclude that the director would have a conflict of interest; and, that this conflict may potentially unduly influence their decision (i.e. “apparent bias”), falling under the Council’s Code as a “prejudicial interest and therefore requiring the relevant Member to exclude themselves from the debate and vote on the item.

Summary

34. Ordinarily, conflicts of interest are managed effectively on a case-by-case basis according to the rules within the Code and principles outlined above, and therefore the use of blanket restrictions on membership of particular committees is not required.
35. However, where the arrangements necessary to manage an interest or relationship prevent the individual properly from discharging their role (for example, if restrictive arrangements would very regularly have to be put in place), then either the interest should be disposed of, or the role relinquished.²
36. As discussed, it is for this reason, in view of forthcoming commercial business at the time of the review (see paragraph 6), that the Governance Task Group recommended a blanket restriction on all Executive Members sitting on the Planning Committee, as the resulting conflicts of interest would be so frequent as to prevent a Member of the Executive from effectively discharging their role as a Member of the Planning Committee.
37. If there is an expectation that forthcoming Council business submitted to the Planning Committee with potential conflicts of interest for Executive Members will be so frequent as to require the regular exclusion of Executive Members if they were allowed to sit on the Committee, then the Council may consider that retaining the current prohibition is the most effective means of managing that risk.
38. In reality, the frequency of Council-sponsored planning applications referred to the Planning Committee since 2015 has broadly declined, including those made either by the Council or its wholly-owned companies (please refer to Figure 1, below). This may be relevant when considering whether a blanket restriction against Executive Members sitting on the Planning Committee is a proportionate mechanism to manage potential conflicts of interest (see paragraphs 22 to 23).

² P.44, Local Government Ethical Standards: A Review by the Committee on Standards in Public Life (January 2019)

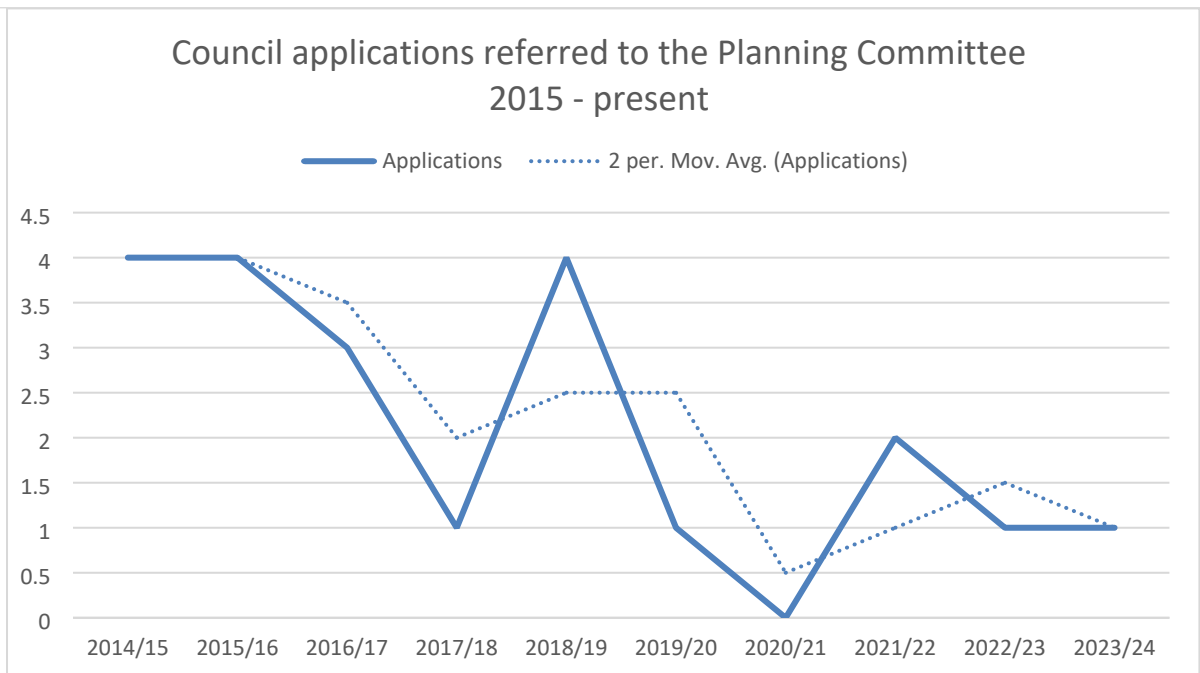


Figure 1 - Council Planning Applications referred to the Planning Committee 2015 - present

- 39.** Alternatively, the Council could reduce the extent of the restriction so that not all Executive Members are prohibited from sitting on the Planning Committee, but just those who present the highest risk of a frequent conflict of interest.
- 40.** For instance, the Local Government Association’s (LGA) ‘Probity in Planning’ guidance³ states that:
- i.* “the leader and portfolio holder of a local authority, who play an important role driving planning policies and proposals, should normally exclude themselves from decision making committees. This is to avoid the perception of a conflict of interests and predisposition.”; and,
 - ii.* “they will need to be extremely careful and will need to withdraw when the committee is considering the council’s own schemes or other applications that they have been seen to support previously.”
- 41.** On balance, considering the advice above, and in view of significant changes to the commercial environment (both in terms of national regulation and local strategy and regulation of financial prudence), it is therefore recommended that the provision excluding Executive Members from sitting on the Planning Committee be amended to exclude only –
- i.** The Leader of the Council;
 - ii.** The Executive Member with responsibility for Planning Policy; and,
 - iii.** Executive Members appointed to any sub-committee with responsibility either:
 - a.** To consider and take decisions with regard to the potential establishment of commercial ventures and the undertaking of other investment activities by the Council; or,

- b. To exercise the function of the Council as a shareholder or partner, in relation to companies, partnerships or other commercial entities owned or part owned by the Council.

42. If this recommendation is approved, Executive Members who are subsequently enabled to sit on the Planning Committee must remain vigilant with regards to declaring and managing any interests or predetermination in respect of Executive decisions which may result in a planning application by the Council in the future, in accordance with the Council's Code of Conduct.

Options

43. Option 1: No change – to retain the existing prohibition of Executive Members from sitting on the Planning Committee. This would provide the strongest possible mitigation of conflicts of interest arising between Executive Members and the Planning Committee., however it may be considered disproportionate.

44. Option 2: To amend the provision excluding Executive Members from sitting on the Planning Committee to exclude only –

- i. The Leader of the Council;
- ii. The Executive Member with responsibility for Planning Policy; and,
- iii. Executive Members appointed to any committee, sub-committee, or position with responsibility either:
 - a. To consider and take decisions with regard to the potential establishment of commercial ventures and the undertaking of other investment activities by the Council; or,
 - b. To exercise the function of the Council as a shareholder or partner, in relation to companies, partnerships or other commercial entities owned or part owned by the Council.

45. Option 3: To remove the restriction on Executive Members sitting on the Planning Committee. This option is not recommended as there is an ongoing risk of frequent conflicts of interest arising for Executive Members with responsibility for planning policy and/or the determination of commercial business, either as a Director for a local authority company, or representing the Council as a shareholder.

Legal Implications

46. There is no legal requirement for a constitutional provision which prevents Members of the Executive from sitting on the Planning Committee; and, there is no legal reason why the Council could not either remove this provision in its entirety or amend it so that it refers to specific Members of the Executive under certain conditions.

47. If the existing provision prohibiting Executive Members on the Planning Committee is removed or amended, then caution must be exercised when considering any future matters referred to the Planning Committee involving development by the Council or of Council-owned land which it is intended to sell to a developer.

³ Local Government Association, "Probity in planning: Advice for councillors and officers making planning decisions (December 2019).

- 48.** In such cases, any members of the Executive who have voted on a decision to carry out such development or to sell related land should, if they are also Members of the Planning Committee, consider the questions of predetermination and bias and whether they need to declare an interest and leave the chamber when the proposal comes before the Planning Committee to obtain the necessary planning permission.

Financial Implications

- 49.** There are no specific financial implications directly relating to this report; however, an increased risk of conflicts of interest which are not managed correctly may result in legal challenge to the Council, leading to significant financial or reputational costs.

Equalities Implications

- 50.** There are no specific equalities implications arising from this report.

Communication Implications

- 51.** There are no specific communication implications arising from this report; however, an increased risk of conflicts of interest which are not managed correctly may result in legal challenge to the Council, leading to significant financial or reputational costs.
- 52.** If either options 2 or 3 are adopted, the (Deputy) Monitoring Officer will update the Constitution accordingly and communication will be sent to the Group Leaders informing them of the change.

Environmental Sustainability Implications

- 53.** There are no environmental sustainability implications.

Risk Management Considerations

- 54.** An increased risk of conflicts of interest which are not managed correctly may result in legal challenge to the Council, leading to significant financial or reputational costs.
- 55.** Approval of option 1 (no change) will provide the strongest possible mitigation of conflicts of interest arising between Executive Members and the Planning Committee.
- 56.** Approval of option 2 (amendment) may marginally increase the risk of conflicts of interest arising on the Planning Committee, by allowing some Executive Members who may vote on matters referred to both the Executive and Planning Committee.
- 57.** However, with the exclusion of the Leader, Planning Policy portfolio holder, and posts or appointments with responsibility for the Council's commercial interests, the amendment proposed under option 2 is an acceptable compromise which will allow any conflicts of interest arising (and the associated risks of apparent bias and predetermination) to be managed effectively under the Council's Code of Conduct.
- 58.** Approval of option 3 (removal) has the potential to increase the risk of conflicts of interest arising on the Planning Committee significantly, as it is likely that there will continue to be commercial business referred to both the Council's Executive (via the

Partner, Shareholder and Trustee Sub-Committee) and Planning Committee in the future.

Other Implications

59. The Council is expected to conduct a review of its Code of Conduct, starting in the current (2023-24) municipal year.

Consultation

60. The original request was considered by Group Leaders at their meetings held on 23rd January 2023; and, 13th March 2023. Group Leaders recommended that the Planning Committee be consulted.
61. Members of the Planning Committee were invited to attend a briefing and consultation meeting on 23rd March 2023. Members discussed conflicts of interest, the process for the declaration and treatment of conflicts, and training for Members of the Planning Committee. The group sought more clarity in respect of the reasons for the request.
62. Approval was sought from Councillors Parnall and Walsh to a written copy of the request and the reasons captured by Democratic Services arising from the Planning Committee consultation on 23rd March 2023, as detailed under paragraph 3.

Policy Framework

63. The Council has committed to promoting good governance in its Code of Corporate Governance, including to act with integrity by ensuring that –
- “Members and officers behave with integrity and lead a culture where acting in the public interest is visibly and consistently demonstrated thereby protecting the reputation of the organisation” –*
- which is demonstrated through the Council’s Code of Conduct and Register of Interests, as explained under the ‘Key Information’ section.

Background Papers

1. The [Council's Constitution](#) (including the [Code of Conduct](#)).
2. The Council’s [Code of Corporate Governance](#).
3. Local Government Ethical Standards: A Review by the Committee on Standards in Public Life (January 2019).
4. Local Government Association, “Probity in planning: Advice for councillors and officers making planning decisions (December 2019).
5. Knowles on Local Authority Meetings (8th edition, 2016).