

<p>Non-Executive Report of the:</p> <p>Standards Advisory Committee</p> <p>Thursday, 30 July 2020</p>	 <p>TOWER HAMLETS</p>
<p>Report of: Asmat Hussain, Corporate Director, Governance and Monitoring Officer</p>	<p>Classification: Open (Unrestricted)</p>
<p>Standards and Code of Conduct Monitoring in relation to planning and development matters</p>	

Originating Officer(s)	Rachel McKoy, Head of Commercial and Contracts, Legal Services
Wards affected	(All Wards);

Executive Summary

This report provides the Standards Advisory Committee with an update of the safeguards and governance arrangements in place at the London Borough of Tower Hamlets to ensure probity in the Council's planning decisions following several high profile instances of unlawful behaviour, specifically surrounding bullying, intimidation and lobbying which have brought the democratic process into disrepute.

Recommendations:

The Standards Advisory Committee is recommended to:

1. Note the content of this report.
2. Note the recommended amendments to the Planning Code of Conduct, Part C, paragraphs 7.2 (d) and (e) of the Constitution concerning lobbying to be forwarded to the Strategic Development Committee for consideration set out in paragraph 6 of the report.
3. Agree to the arrangement/and facilitation of training for Members' of the Strategic Development and Development Committees on lobbying following the recent legal judgement in Holborn Studios (No.2) discussed at paragraphs 6 and 12 of the report.

1. REASONS FOR THE DECISIONS

- 1.1 The function of the Standards Advisory Committee is to maintain high standards of conduct in public life which include:
 - Promoting and maintaining the Members Code of Conduct and other local protocols.
 - Assisting in training and offering advice on matters relating to the Codes.
 - Advising the Council on the adoption and revision of the Code of Conduct and the various Protocols included in the Constitution.
 - Considering any potential breaches of the Members Code of Conduct

- 1.2 This report assists the Committee in discharging its responsibilities by reporting upon recent legal decisions that have specific implications in the sphere of planning and the decisions of the Council's Strategic Development and Development Committees. It will focus upon the safeguards, checks and balances currently in place to ensure probity in planning and the suggested amendments required to the Planning Code of Conduct to facilitate lawful decision making.

2. ALTERNATIVE OPTIONS

- 2.1 None.

3. DETAILS OF THE REPORT

- 3.1 The importance of maintaining probity in the sphere of planning decisions has recently been the focus of the national and local media attention. Two prominent examples of cases that have brought this issue to the fore, being the cases of Westferry Printworks and Holborn Studios (2). The former case involved the Council's successful legal challenge and subsequent quashing of the planning permission, granted by the Secretary of State by way of recovered appeal, on the grounds of his "apparent bias." The latter case culminated in the quashing of the planning permission granted by the London Borough of Hackney's Planning Committee for the re-development of the largest photographic studios in Europe and provided the final instalment to several years of litigation which is discussed in further depth within the report.

- 3.2 The common denominator in both cases was the involvement of different aspects of lobbying in planning decisions. Westferry involved apparent bias in the timing of the Secretary of State's decision, one day prior to the adoption of the Council's Community Infrastructure Levy, which was justified as being on the basis of viability in the government's pre-action protocol response to the Council's threat of legal challenge. This decision also, importantly, followed an undisclosed meeting between the Secretary of State and the developer at a Conservative Party fundraising dinner where it has since transpired some discussion took place regarding the scheme. Ultimately, the Government conceded to judgement on the grounds that the Porter v Magill test of "apparent bias" was engaged.

- 3.2 Additionally, recent events at Redbridge Borough Council involving an investigation into the alleged misconduct of the Leader has caused the authority significant reputational damage. In this instance, raising the themes of bullying, intimidation, the politicisation of the planning committee process, and use of improper influence on the Chair, which have again highlighted the importance of maintaining transparency and probity in the Local Government space.

Principles of public participation – virtual committees

- 3.3 The advent of COVID -19 heralded the introduction of the new "virtual" committee and compliance with the Local Authorities and Police and Crime Panels (Coronavirus) (Flexibility of Local Authority and Police and Crime Panel Meetings) (England and Wales) Regulations 2020 ("the 2020 Regulations") and established new ways of conducting council business. Ensuring accountability and full public participation in decision making and adherence to the Code of Conduct has brought these issues under the gaze of public scrutiny. Therefore, high standards of conduct from local government elected members are therefore required, and demanded, to protect the integrity of decision-making, maintain public confidence, and safeguard local democracy.

- 3.4 The Strategic Development /Development Committee's decisions have a significant impact on the borough and the public has a right to expect that the process of making planning decisions is both transparent and legally robust. The common law principle of fairness has not changed in this respect during and following the recent lockdown period.
- 3.5 The Governance Directorate has been at the forefront of ensuring public participation in its planning decisions. It has worked alongside various interested community groups in response to the recommendations raised in a joint "Statement of Principles of Public Participation" received on behalf of various local community groups within the borough. This workstream has ensured that full consideration is given to this issue and that public concerns are addressed. It has been led by the Monitoring Officer in collaboration with Democratic Services, Head of Planning and Head of Commercial and Contracts (Legal).
- 3.6 The Statement raised various challenges to the operation of "virtual" planning committees and made several recommendations relating to aspects of the decision-making process. These included the presentational mechanics of the virtual space, the treatment of update reports, public access to committee information and the application of the respective procedures. These processes were reviewed and updated, where deemed necessary, to ensure their fitness for purpose.
- 3.7 Members will note that this review of the Principles of Public Participation also established that all Member virtual decision-making undertaken at the Strategic Development and Development Committees to date have been sound. This was facilitated by ensuring that all Members received copies of the agenda a week before the meeting (hard copy if required) and had sufficient time to familiarise themselves with the details. Weblink connections were tested before the meetings commenced, and during the meeting the Chair was able to communicate with all Members, all of whom were able to participate fully in the deliberations. Equally, when it came to the vote each Member confirmed that they had seen and heard the debates. During the virtual planning committees, held to date, both officers who were in attendance to support Members, and committee Members, have had a number of options to communicate any difficulties they were experiencing to officers on standby to assist when and where necessary.
- 3.8 Additionally, update reports are now published at least 3 hours before the start of the meeting in order to afford additional time for public review. Presenting Officers are also clearer in their referencing of the update report in the introduction and presentations, which now have a stronger focus upon drawing out the main points in objection or support of the particular agenda item.
- 3.9 Members will note that it is imperative for the Council to maintain a robust system, which includes adequate safeguards reflected in codes of conduct, investigation mechanisms and sanctions as necessary. This is reflected in section 27 of the Localism Act 2011 ("the Act") requires relevant authorities to promote and maintain high standards of conduct by members and co-opted members of the authority. Each local authority must publish a code of conduct, and it must cover the registration of pecuniary interests, the role of an 'independent person', and sanctions to be imposed on any councillors who breach the Code.
- 3.10 Paragraph 31 of the Tower Hamlets Code of Conduct for Members incorporates the Nolan Principles and forms part of the Council's ethical framework which should be read in conjunction with the Council's disciplinary codes which regulate the conduct of officers, and other relevant codes and guidance, including the Member/Officer Relations Protocol and Planning Code of Conduct (Constitution Part C Section 35) (Planning Code of Conduct), Guidelines for Determining Planning Applications under the Town and

Country Planning Act 1990 and Development Committee Procedure Rules (Constitution Part D Section 53).

- 3.11 Failure to comply with the requirements to register or declare disclosable pecuniary interests is a criminal offence. Taking part in a meeting or voting, when prevented from doing so by a conflict caused by disclosable pecuniary interests, is also a criminal offence. Political parties may have their own internal standards and resolution procedures in addition to those set out in the Member Code of Conduct. Expected standards of behaviour should also be embedded through effective induction and ongoing training.

Bullying, intimidation and exerting undue influence

- 4 Importantly, Members need to avoid any appearance of bias or of having a predetermined view before taking a decision, and clearly should not take a decision, on a matter when they are actually biased in favour or against the application. This extends to situations where it might appear to a fair and informed observer that there was a real possibility of bias, or where a Member has predetermined the matter by closing their mind to the merits of the decision. Any planning decision made by a Member who can be shown to have approached the decision with a closed mind is unlawful under section 25 of the Act and will expose the Council to the risk of legal challenge.
- 4.1 Members will note that one of the live issues of investigation at Redbridge Council was the allegation that the Chief Whip had removed and replaced members of the planning committee, with untrained Members, in order to mould the outcome of decision making and that he had exercised undue influence upon the Chair of the Committee to determine a planning application in a biased manner.
- 4.2 In the context of the Council, the Mayor is responsible for most decisions about day-to-day Council services but this excludes the regulatory council functions such as planning. However, the Mayor, the lead Member and other Members of the Executive may be approached regarding or become involved in planning applications. In such circumstances the Council's Planning Code of Conduct also applies to them, particularly paragraphs 6, 7, 8 and 10. The Code clearly stipulates that they should not attend the pre-Committee site visits organised by officers unless they sit on the Planning Committee. Further, Members of the Executive should not meet to discuss how to vote on any application at any sort of political group meeting, or lobby any other Member to do so.
- 4.3 Members will note that the Council's Code of Conduct for Members and Planning Code of Conduct is clear that Members of the Strategic Development and Development Committees must not make up their mind, or appear to have made up their mind on how they will vote on any planning matter prior to formal consideration of the matter at the meeting of the Committee. The latter states that "this includes deciding or discussing how to vote on any application at any sort of political group meeting, or lobby any other Councillor to do so." Additionally, in circumstances where a member "has an interest in a local lobby group or charity or pressure group they may appear predetermined by their actions and/ or statements made in the past".
- 4.4 Further, Part D Section 5 paragraph.8.4 of the Development Procedure Rules provide that a Member who is not a member of the determining Committee who speaks at a meeting must include within the speech details of any contact with the applicant, agent, adviser or other interested party and whether or not the speech is made on behalf of such person(s) or any other particular interest. Where such Members are present at a meeting, the rules stipulate that they should sit separately from the Committee members,

so as to demonstrate clearly that he/she is not taking part in the discussion, consideration or vote and refrain from communicating in any way with members of the Committee. This extends to the passing of exchange of papers or documents to committee members either before or during the meeting (paragraph 8.6).

- 4.5 These arrangements will now need to be applied to the current medium of “virtual” committee meetings with the direction and assistance of the Democratic Services and Legal Officers in attendance at the respective meeting. However, they demonstrate the safeguards the Council has in place to ensure that Members of the Strategic Development and Development Committee exercise their roles and responsibilities free from any undue influence.
- 4.6 The Code of Conduct for Members emphasises the need for Councillors to avoid behaviour which could be viewed as conferring an advantage or disadvantage on an officer. Members must not seek personal favours from officers. It advises that Chief officers, through their senior management, are responsible for the allocation and prioritising of work by their staff. Members should not seek to influence such decisions constituents’ queries or concerns should be addressed through the proper channels being the Member’s Enquiries system.
- 4.7 Importantly, Members are reminded that of their obligation to show respect, dignity and courtesy to each other and not to be subjected to bullying or personalised attacks. Differing political views and values are to be respected and a commitment to high standards of debate and compliance with the Council’s Constitution including the Code of Conduct for Members maintained.
- 4.8 Members’ will note from the report that bullying and intimidation is an issue of concern in Local Government and that allegations by a Member of this behaviour formed part of the recent investigation at Redbridge Council. However, Member’s will note that Part C subparagraph 31.6 of the Constitution advises that Members must act solely in the public interest, promote equality, and not discriminate unlawfully against any person. It further stipulates that Members should treat all people with respect, that they should not bully or harass any person and should respect the impartiality and integrity of the Council’s officers”. Therefore, these clear principles are enshrined within the Council’s collective Codes and instances of such behaviour are addressed in accordance with the complaints procedure and dealt with in accordance with the arrangements set out in Appendix A to the Members Code of Conduct.
- 4.9 The arrangements for dealing with complaints for breach of the code was agreed by Council on 5 June 2016. This includes a robust procedure whereby the MO which make provision for the appointment of an independent person and the investigation of the said complaint within the stipulated timelines. In making this determination the Monitoring Officer may at their discretion report the matter to the Investigation & Disciplinary Sub-Committee (IDSC) of the Standards (Advisory) Committee for consideration and/or consult other persons as appropriate.

5. Lobbying

- 5.1 Members are reminded through training and the Planning Code of Conduct (Appendix 1) that in being a Councillor of a political group they are allowed to be predisposed in relation to planning policies of the Council or to planning policies of the Councillor’s political party, providing that predisposition does not give rise to a

public perception that the Councillor has due to his/ her political membership predetermined a particular matter. This is important in the context of lobbying.

- 5.2 The Member code of Conduct advises that lobbying is the process by which applicants and their agents, objectors, non-Committee Members and other interested parties seek to persuade Members who sit on the Committee to come to a particular decision. It is a legitimate part of the planning process for them to approach Members who sit on Committee as these discussions can help Members to understand the issues and concerns. This can happen prior to an application being made or at any time after the application is made. Legal guidance on the lawful approach to be adopted by Members in respect of lobbying in the Local government context has been helpfully clarified in a recent legal decision.

6. Holborn Studios (No.2)

- 6.1 The recent high court decision of *Holborn Studios Ltd, R (on the application of) v London Borough of Hackney & Anor* [2020] EWHC 1509 (Admin) (11 June 2020) concerned the right for members of the public to lobby councillors. This case provides a salutary tale against exercising excessive caution concerning the direct lobbying of members. In this case, public objections were held back from members of the Planning Committee. The judgement was clear that the public should not be discouraged from lobbying members directly in correspondence to document their objection(s) and that equally members should not be afraid of reading such correspondence. It was held that this information flow is necessary to reflect the entitlement of freedom of expression and is part of the democratic process.
- 6.2 Although lobbying is a standard and legitimate part of the political process, it can cause the perception of bias or predetermination. The Planning Code of Conduct reminds Members that if they do discuss a case then in no circumstances should any indication of voting intentions be provided. Members are reminded that to do so without all relevant information and views would be unfair and detrimental and that the retention of a formal written record of the discussion is paramount so as to enable the Councillor to disclose the fact and nature of such an approach at any relevant meeting of the Development Committee.
- 6.3 However, Members are advised that the Planning Code of Conduct was last updated on 19 July 2017 and pre-dates the Holborn judgement. Section 7.2 (d) and (e) of the Code states that to avoid a perception of bias if a Councillor is approached, they should follow the principles set out in section 2.6 of this Code and also:
- (d) inform the person making the approach that such approach should be made to officers within the Place Directorate or to elected Councillors who are not Councillors of the either the Development Committee or Strategic Development Committee;
 - (e) forthwith notify in writing to the Monitoring Officer the fact that such an approach has been made, identifying the application, the nature of the approach, by whom it was made, and the action taken by the Councillor

concerned. This should include any offers made of planning gain or constraint of development, through a proposed section 106 Planning Obligation or otherwise; and

6.4 Following the Holborn case, the interpretation of clause 7.2 (d) and (e) will be clarified/ and or revised in the Planning Code of Conduct. Members of the Strategic Development and Development Planning Committee will also need to be advised on the current legal position to ensure they are clear on the extent of their considerations as part of the decision making function in the context of lobbying from members of the public. Consistent with the Holborn judgement it should also be made clear that as part of Members' lawful consideration of such material they should, by way of best practice, be passed onto officers to provide them with the opportunity to ensure that the issue(s) are fully considered. This Committee is asked to approve the arrangement of training for Members' of the Strategic Development and Development Committees on lobbying in light of judgement as set out in Recommendation 2 and to note Recommendation 3 of the report, which will facilitate the work stream to amend the Planning Code of Conduct as discussed above by way of reference to the Strategic Development Committee.

6.5 Importantly, where a Member feels that they have been unreasonably or excessively lobbied on a proposal they must make a declaration, at the Strategic Development or Development Committee, on that application that they have been lobbied. Provided that the Member has followed the principles in this Code then they will still be able to speak and vote on the application.

7 Training

7.1 As highlighted above, training of planning committee members is another important safeguard to ensure probity in planning. The Council's Planning Code of Conduct reflects this requirement by stipulating that Members must undertake compulsory training. It is clearly stated that "failure to participate in the compulsory elements of the training may result in that Member being asked to stand down as a Member of relevant Committee". The compulsory training programme covers issues relating to probity in planning, principles in planning to reflect government guidance and case law. Discretionary training also provides extended training on planning law, regulations, procedures, Codes of Practice, Development Plans and best practice. As set out in Recommendation 2, and discussed at paragraph 6.4 of the report, the Committee's authorisation to make arrangements for the training of Members' is sought to reflect the requirement to ensure probity in planning.

7.2 The report into Local Government Ethical Standards undertaken by the Committee on Standards in Public life in January 2019 advised that several high-profile cases of corporate failure in local government demonstrated that where standards risks are not addressed it can lead to corporate failure. The review discussed the importance of establishing and maintaining an ethical culture and the leadership required across the full spectrum of individuals and groups to reflect the multi-faceted nature of local government (including the authority's standards committee, the Chief Executive and political group leaders) and made a number of recommendations to improve ethical standards to be incorporated into a new Model Code of Conduct.

8. New Model Code of Conduct Consultation

8.1 Members are advised that the Local Government Association (“LGA”) is currently consulting upon the draft new Model Code of Conduct until the 17 August 2020. It has been developed in collaboration with the sector and will be offered as a template for councils to adopt in whole and/or with local amendments. The LGA have advised they “will undertake an annual review of the Code to ensure it continues to be fit-for-purpose, particularly with respect to advances in technology, social media and any relevant changes in legislation”. The feedback from the consultation will be fed into the development of a final draft to be reviewed by the LGA’s Executive Advisory Board and presented to the LGA General Assembly in the Autumn of 2020. Once finalised, the LGA will also offer support, training and mediation to councils and members on the application of the Code. Further information concerning the consultation will be brought to members of the Standards Advisory Committee in due course.

9. EQUALITIES IMPLICATIONS

9.1 Ensuring that planning decisions are lawful, robust and transparent and that members undertake exercise their democratic mandate in accordance with the Code of Conduct will ensure compliance with the Council’s equality duty under s149 Equality Act and that due regard is given to the full range of protective characteristics.

10. OTHER STATUTORY IMPLICATIONS

10.1 This section of the report is used to highlight further specific statutory implications that are either not covered in the main body of the report or are required to be highlighted to ensure decision makers give them proper consideration. Examples of other implications may be:

- Best Value Implications,
- Consultations,
- Environmental (including air quality),
- Risk Management,
- Crime Reduction,
- Safeguarding.
- Data Protection / Privacy Impact Assessment.

11. COMMENTS OF THE CHIEF FINANCE OFFICER

11.1 There are no direct financial implications emanating from this report which provides an update of the safeguards and governance arrangements in place at the London Borough of Tower Hamlets to ensure probity in the Council’s planning decisions

12. COMMENTS OF LEGAL SERVICES

12.1 The Standards Advisory Committee is requested to note and approve the Recommendations set out in the report.

12.2 In accordance with section 27(1) of the Localism Act 2011 (the Act) a “relevant authority” is under a statutory duty to “promote and maintain high standards of

conduct” by members and co-opted members of the authority.” As set out in the report, the Council has incorporated various safeguards into its planning decision making process, upheld by the respective Codes of Conduct and various procedural rules, that enshrine probity in its planning decisions. These include the work undertaken to enshrine principles of public participation in the virtual planning committee space.

- 12.3 Paragraph 6 of the report references the case of Holborn Studios (No.2) where the High Court ruled for the first time upon the right of the public to lobby Members of the Planning Committee and the extent of Members’ lawful obligation to consider such representations in advance of taking a respective planning decision on the matter.
- 12.4 This is a significant case in respect of planning decision making and Members are advised to note the legal principles it established and their application to the Planning Code of Conduct as set out at paragraphs 6.2-6.4 of the report.
- 12.5 In summary, Members are advised that the facts of the case concerned the practice of the London Borough of Hackney of prohibiting planning committee members from reading correspondence sent to them from members of the public in respect of forthcoming applications. The Chair, following advice provided by officers, advised the committee in response of objections received from the applicant that “Planning members are advised to resist being lobbied by either applicant or objectors.”
- 12.6 Dove J held that it was ‘indisputably correct’ that ‘that issues in relation to freedom of expression and the application of Article 10 of the ECHR were engaged in the communication between members of a local authority, and in particular members of a planning committee, and members of the public who they represent and on whose behalf they were making decisions in the public interest’ (para 78).

He stated:

“Similarly, bearing in mind the importance of the decisions which the members of the planning committee are making, and the fact that they are acting in the context of a democratically representative role, the need for the communication of views and opinions between councillors and the public whom they represent must be afforded significant weight. In my view, it would be extremely difficult to justify as proportionate the discouragement, prohibition or prevention of communication between public and the councillors representing them which was otherwise in accordance with the law. Here it was no part of the defendant’s case to suggest that the communication which the claimant made in their correspondence in respect of the committee report was anything other than lawful.”

- 12.7 Mr Justice Dove concluded (para 79):

“Receiving communications from objectors to an application for planning permission is an important feature of freedom of expression in connection with democratic decision-taking and in undertaking this aspect of local authority business. Whilst it may make perfect sense after the communication has been read for the member to pass it on to officers (so that for instance its existence can be logged in the file relating to the application, and any issues which need to be addressed in advice to

members can be taken up in a committee report), the preclusion or prevention of members reading such material could not be justified as proportionate since it would serve no proper purpose in the decision-taking process. Any concern that members might receive misleading or illegitimate material will be resolved by the passing of that correspondence to officers, so that any such problem of that kind would be rectified”.

- 12.8 He further stated “In my view there is an additional issue of fairness which arises if members of the planning committee are prevented from reading lobbying material from objectors and required to pass that information unread to their officers. The position that would leave members in would be that they would be reliant only on material from the applicant placed on the public record as part of the application or the information and opinions summarised and edited in the committee report. It is an important feature of the opportunity of an objector to a planning application to be able to present that objection and the points which they wish to make in the manner which they believe will make them most cogent and persuasive. Of course, it is a matter for the individual councillor in the discharge of his responsibilities to choose what evidence and opinion it is that he or she wishes to study in discharging the responsibility of determining a planning application, but the issue in the present case is having the access to all the material bearing upon the application in order to make that choice. If the choice is curtailed by an instruction not to read any lobbying material from members of the public that has a significant impact on the ability of a member of the public to make a case in relation to a proposed development making the points that they wish to make in the way in which they would wish to make them”.

Linked Reports, Appendices and Background Documents

Linked Report

- None.

Appendices

- Appendix 1 – Planning Code of Conduct, Part C of the Constitution

Local Government Act, 1972 Section 100D (As amended)

List of “Background Papers” used in the preparation of this report

List any background documents not already in the public domain including officer contact information.

NONE.

Officer contact details for documents:

Rachel Mckoy – Head of Commercial and Contracts