

<b>Council</b>	
<b>Meeting Date</b>	16 March 2016
<b>Report Title</b>	Amendment to Note i of Part 3.2.1 of the Constitution – Head of Planning ‘call-in’ powers
<b>Cabinet Member</b>	Cllr Gerald Lewin, Cabinet Member for Planning
<b>SMT Lead</b>	Kathryn Carr
<b>Head of Service</b>	James Freeman
<b>Lead Officer</b>	James Freeman
<b>Key Decision</b>	No
<b>Classification</b>	Open
<b>Forward Plan</b>	<b>Reference number:</b>
<b>Recommendations</b>	1. Agree NOT to amend the constitution following the motion submitted by Members

## 1 Purpose of Report and Executive Summary

- 1.1 The following motion, proposed by Councillor Mike Baldock and seconded by Councillor Mark Ellen, was submitted to the Council on 27 January 2016:

“To amend note i of Part 3.2.1 of the Constitution from "that in cases where the Committee is minded to make a decision that would be contrary to officer recommendation and contrary to policy and/or guidance, the Chairman should invite the Head of Planning to consider if the application should be deferred to the next meeting of the Committee or if there should be a short adjournment for Officers to consider the views of the Planning Committee and to give further advice."

to

"That in cases where the Committee is minded to make a decision that would be contrary to officer recommendation and contrary to policy and/or guidance, the Chairman should invite the Head of Planning to consider if there should be a short adjournment for Officers to consider the views of the Planning Committee and to give further advice at the same meeting."

- 1.2 As per the Council’s constitution, the motion was referred without discussion to this Committee so that a full report explaining the position and implications of the motion could be considered.

- 1.3 This report explains the background to the current constitution position, and considers the pros and cons of the motion. As a result, it sets out a recommendation that, on balance, the benefits of minimising the risks of substantial costs and potential adverse impact on the reputation of the Council are significant enough to suggest that the existing constitutional arrangements should be maintained.

## **2 Background**

### **Constitutional background**

- 2.1 The Local Planning Authority has to make decisions balancing the material considerations to avoid challenge, and these powers assist in ensuring that the Council complies with its responsibility under Article 13 of the constitution in that the following principles must be followed:
- (a) Proportionality
  - (b) Due consideration and the taking of professional advice from officers
  - (c) Respect for human rights
  - (d) A presumption in favour of openness
  - (e) Clarity of aims and desired outcomes
  - (f) Due regard for the individuals and communities served by SBC.
- 2.2 Most often, the Planning Committee will review the evidence brought forward by officers, and respect the recommendation that is set out in the report. However, on occasions the Planning Committee may be minded to reject the recommendation that has been set out. On such occasions, the issue is whether the Planning Committee is able to articulate good reasons for its position, as judged against Planning legislation, Planning Case Law, and local planning policy.
- 2.3 Regardless of the reasons given by the Planning Committee, in such cases the applicant has the right to appeal the decision. However, in the absence of any such sound reasons, then not only is the appeal much more likely to succeed, but costs are also likely to be awarded against the Council, on the basis that the Council has acted unreasonably and has caused another party to incur unnecessary expense as a result. Unreasonable behaviour in this instance would relate to issues surrounding the merits of the appeal – please refer to appendix 1 for examples. Costs to the Council can range from a few thousand pounds to well in excess of £100k for major significant planning applications and would be dependant on the reasons for refusal.
- 2.4 In order to mitigate the likelihood of such an event, the Council introduced into its Constitution the option of a ‘call-in’ power for the Head of Planning (or his designated deputy) to call in a planning application at Planning Committee when the Committee was minded to make such a decision without strong planning

arguments for doing so. This is designed to allow time to review the position and provide further evidence to the Committee, such that a decision that is sound in planning terms is more likely to be arrived at, including the drafting of viable reasons for refusal.

## **Use of the powers in practice**

- 2.5 Swale BC was one of the first Councils to introduce such 'cooling-off' powers in Kent, and since then many authorities have adopted similar powers into their constitutions. At Swale, the power is used on an infrequent basis and only where the Head of Planning Services believes that the Council would be at a significant risk of having costs awarded against it and/or having a prejudicial impact for the continuing future use of an adopted planning policy, and the resultant cumulative consequential costs.
- 2.6 The 'call-in' powers have been in place for many years and have been used only on a few occasions. In the most recent five years the powers have been used on eleven occasions, as follows:
- in four cases, Planning Committee followed HoS recommendation to Approve;
  - in five cases Planning Committee chose to refuse the planning application;
  - in one case the applicant withdrew their application following the 'call-in'; and
  - in one case the application is still in the Call In process (Perry Court).
- 2.7 All five of the refusals resulted in an Appeal being made, with the following outcomes:
- in one case the Appeal was withdrawn by the applicant;
  - in two cases the Appeal was allowed
    - in one of these cases costs were not sought (Woodlands Lodge);
    - in one of these cases costs were sought but refused (land rear of Bell Centre); and
  - in two cases the Appeal process is still underway (New Rides Farm and Seager Rd).
- 2.8 Whilst the Council has not been subject to any significant costs in relation to any 'called-in' planning application, one of the outstanding cases regarding a wind farm application may well give rise to significant costs against the Council should the Planning Committee's reasons for refusal not be accepted by the Planning Inspector. The Planning Committee was recently advised that the costs could amount to £200K+ and accepted that the 'health' reason for refusal should be

removed, although costs remain likely to amount to substantially above £100K should the Council's other reasons for refusal be found unsubstantiated.

- 2.9 Similarly, any major scheme involving housing development where we currently have no five-year housing land supply and no substantive national planning designation protecting the site, if refused and exposed at appeal could lead to significant legal and technical costs of over £100K.
- 2.10 The existence of the 'call-in' procedures enables the Head of Planning to consider, either with regard to the policy background to a particular case or the evidence submitted, that the Council could be found by an Inspector to have acted unreasonably given its stated reasons for refusing a planning application.
- 2.11 The call-in procedure therefore allows:
- (i) these issues to be highlighted;
  - (ii) an assessment to be made of the likely implications for the overturn, including the reasons for refusal sought;
  - (iii) assessment of the likelihood of succeeding at appeal; and
  - (iv) assessment of whether the Council could be subjected to significant costs.
- 2.12 When considering potential 'call-in' decisions, the Head of Planning will base his judgement on the balance of the material planning considerations involved, and the consequential likelihood of the risks of significant costs to the Council, or where the future application of agreed Local Plan policy could be prejudiced.
- 2.13 All of the above considerations would usually require extensive review and analysis, including reference to case law and evaluation of complex evidence. This can often require specialist input (and potential research) that may not be readily available at the Planning Committee for the Head of Planning to refer to, and cannot be dealt with through a short adjournment.

## Pros and Cons

2.14 Given the above, the pros and cons of the Motion can be set out, as follows:

Pros if the Motion is adopted	Cons if the Motion is adopted
<ul style="list-style-type: none"> <li>▪ Enable members of the public to attend only one meeting with the prospect of reaching a determination, unless the matter is deferred by members of the Committee</li> <li>▪ Consequently reduces the potential for confusion and frustration of the general public</li> </ul>	<ul style="list-style-type: none"> <li>▪ Unrealistic expectations of officers being able to respond effectively in a short space of time to complex issues raised by members, including:               <ul style="list-style-type: none"> <li>- the robustness of the reasons for refusal being sought;</li> <li>- enabling a full legal and technical review and assessment of those</li> </ul> </li> </ul>

<ul style="list-style-type: none"> <li>▪ Reduce any perception that officers are over-ruling the Planning Committee</li> <li>▪ Speed up decision making and contribute to meeting targets</li> <li>▪ Prevent decision-making delay and the associated costs of reporting to a further Committee meeting</li> </ul>	<ul style="list-style-type: none"> <li>issues; and <ul style="list-style-type: none"> <li>- the risks of potential costs to the Council e.g. reference to previous case law</li> </ul> </li> <li>▪ Lead to officers not being able to fully consider all the issues, implications and risks and, consequently, not being able to inform the Planning Committee of all the issues involved in making a sound decision</li> <li>▪ Increase the risk to the Council of receiving significant costs for 'unreasonableness' in decision making - which can amount to significant sums in excess of £100K</li> <li>▪ Lose the opportunity for 'cooling-off' from the controversy and high public profile of items presented at a Planning Committee meeting, buying the time for further consideration</li> </ul>
--	---

### 3 Proposals

3.1 Given the balance of pros and cons set out above, it is considered that there are no significant implications for continuing to allow a 'call-in' period. On the few occasions that it is actually used, it enables the Planning Committee to make a robust decision based on full consideration of the evidence and potential implications of going against an officer recommendation.

3.2 In the absence of such Constitutional option, the potential risks to the Council of costly appeal decisions would be much greater, in the absence of the time to provide the Committee with the necessary officer advice, which may require specialist research and support in informing Committee Members before a formal decision is made.

### 4 Alternative Options

4.1 The report considers the existing constitutional process compared with the proposed Motion for change, and the arguments for both are set out above.

4.2 There are potentially myriad minor alternatives to the existing wording of the Constitution which could be considered – for example, the power of call-in could fall to the Chair of the Planning Committee under advice from the Head of Planning.

- 4.3 An alternative approach has been adopted at South Oxfordshire where the Head of Planning considers that he/she may wish to use the “cooling off” powers, he/she will inform the Planning Committee accordingly before the meeting proceeds to the next item. He/she will then consult with the Cabinet Member for Planning or in his/her absence the Leader of the Council and confirm his/her decision by noon on the second working day after the date on which the decision was taken. If he/she confirms a “cooling off period”, he/she will not issue the decision notice but will bring a further report to the committee at the first opportunity setting out the relevant issues and inviting it to reconsider the matter. The decision taken by the Committee having considered this second report will be final and the Head of Planning will issue the decision notice.
- 4.4 Maidstone Borough Council have also included within their constitution an alternative approach involving the setting up of a Planning Referrals Committee. This Committee is comprised of three councillors from each of the largest three political groups, excluding Councillors and substitute members of the Planning Committee. This group will then determine planning applications referred to it by the Head of Planning and Development if s/he is of the opinion that the decision of the Planning Committee is likely to have significant cost implications.

## 5 Consultation Undertaken or Proposed

- 5.1 The Planning Committee Chair have been consulted on the motion and the report and his views will be verbally presented at the meeting
- 5.2 Whichever option is agreed, it is important to ensure that the public gallery and applicants are made fully aware of what decisions are being voted upon and what procedures are being implemented.

## 6 Implications

Issue	Implications
Corporate Plan	A well run Planning Committee contributes to the “A council to be proud of” priority, in terms of supporting the efficiency and performance of the Council.
Financial, Resource and Property	It is not possible to identify what the likely financial risks are to the Council of agreeing to the Motion as put forward. However, as a marker the current appeal being considered for the Four Rides Farm wind turbine appeal is expected to incur circa £400,000 costs both internally and relating to the applicant.  Any significant costs claim would need to be met from reserves.
Legal and Statutory	Covered in the main report.
Crime and	None identified.

Disorder	
Sustainability	None identified.
Health and Wellbeing	None identified.
Risk Management and Health and Safety	Any risks associated with the item relate to financial and reputational risks.
Equality and Diversity	None identified.

## **7 Appendices**

- 7.1 Appendix I: National Planning Policy Guidance (NPPG): What type of behaviour may give rise to a substantive award against a local planning authority?

## **8 Background Papers**

- 8.1 Council Constitution – weblink

<http://services.swale.gov.uk/meetings/ieListDocuments.aspx?CId=287&MId=1469&Ver=4&Info=1&a=1>

## National Planning Policy Guidance (NPPG)

### What type of behaviour may give rise to a substantive award against a local planning authority?

Local planning authorities are at risk of an award of costs if they behave unreasonably with respect to the substance of the matter under appeal, for example, by unreasonably refusing or failing to determine planning applications, or by unreasonably defending appeals. Examples of this include:

- preventing or delaying development which should clearly be permitted, having regard to its accordence 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.
- refusing planning permission on a planning ground capable of being dealt with by conditions risks an award of costs, where it is concluded that suitable conditions would enable the proposed development to go ahead
- acting contrary to, or not following, well-established case law
- persisting in objections to a scheme or elements of a scheme which the Secretary of State or an Inspector has previously indicated to be acceptable
- not determining similar cases in a consistent manner
- failing to grant a further planning permission for a scheme that is the subject of an extant or recently expired permission where there has been no material change in circumstances
- refusing to approve reserved matters when the objections relate to issues that should already have been considered at the outline stage
- imposing a condition that is not necessary, relevant to planning and to the development to be permitted, enforceable, precise and reasonable in all other respects, and thus does not comply with the guidance in the [National Planning Policy Framework](#) on planning conditions and obligations
- requiring that the appellant enter into a planning obligation which does not accord with the law or relevant national policy in the [National Planning Policy Framework](#), on planning conditions and obligations



- refusing to enter into pre-application discussions, or to provide reasonably requested information, when a more helpful approach would probably have resulted in either the appeal being avoided altogether, or the issues to be considered being narrowed, thus reducing the expense associated with the appeal
- not reviewing their case promptly following the lodging of an appeal against refusal of planning permission (or non-determination), or an application to remove or vary one or more conditions, as part of sensible on-going case management.
- if the local planning authority grants planning permission on an identical application where the evidence base is unchanged and the scheme has not been amended in any way, they run the risk of a full award of costs for an abortive appeal which is subsequently withdrawn

(This list is not exhaustive).