

DEMOCRACY COMMITTEE**15 November 2017****Planning Referral Process Review**

Final Decision-Maker	Council
Lead Head of Service	Angela Woodhouse – Head of Policy, Communications and Governance
Lead Officer and Report Author	Angela Woodhouse – Head of Policy, Communications and Governance (Lead Officer) Debbie Snook – Democratic Services Officer (Report Author)
Classification	Public
Wards affected	All

Executive Summary

This report sets out the recommendations of the Working Group appointed by the Democracy Committee to review the arrangements for managing risk in relation to Planning Committee decisions, including the Planning Referral process.

This report makes the following recommendations to this Committee:

That the Council be recommended to agree:

1. That there is a need to provide a check and balance mechanism in relation to Planning Committee decisions, and there should continue to be provision for the referral of an application to a second body for determination in circumstances where the Planning Committee votes to continue with a decision that it has been advised cannot be sustained at appeal and which could have significant cost implications for the Council's budget, but that body should be the Policy and Resources Committee and the Planning Referrals Committee should be abolished.
2. That in the event of an application being referred to the Policy and Resources Committee for determination, then a special meeting of the Committee should be arranged for this purpose, the provisions relating to public speaking at Planning Committee should apply and there should be no provision for referral of the Committee's decision to full Council.
3. That no Member will be able to serve on the Policy and Resources Committee without having agreed to undergo the mandatory training required to be undertaken by Members and Substitute Members of the Planning Committee, including training on pre-determination of planning applications. The training must be completed before the Policy and Resources Committee first meets to discharge its function as the Planning Referral body, and must be refreshed as appropriate.

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4. That, with regard to the sections of the Constitution/Local Code of Conduct for Councillors and Officers Dealing With Planning Matters relating to Planning Decisions Which Have Significant Cost Implications, the delegation to the Head of Planning and Development upon the advice of the Legal Officer present to refer an application to a second body for determination should be amended to be in consultation with the Chairman of the meeting.
5. That the Monitoring Officer be requested to amend the Constitution and Local Code of Conduct for Councillors and Officers Dealing with Planning Matters accordingly.

Timetable	
<i>Meeting</i>	<i>Date</i>
Democracy Committee	15 November 2017
Council	6 December 2017

Planning Referral Process Review

1. INTRODUCTION AND BACKGROUND

1.1 Following the activation of the Planning Referral process earlier in the year when the Head of Planning and Development referred a decision of the Planning Committee to the Planning Referrals Committee, Group Leaders asked the Democracy Committee to review the arrangements for managing risk in relation to Planning Committee decisions, including the Planning Referral process. The Democracy Committee, at its meeting held on 3 July 2017, appointed a Working Group comprising all Members of the Committee to carry out the review.

1.2 The terms of reference of the Working Group were agreed as follows:

To consider how the Council can provide a check and balance for Planning Committee decisions and reduce the financial and legal risk for the Council giving consideration to:

(a) Other Councils' arrangements and models;

(b) Options for and/or improvements to the current arrangements; and

(c) Any other ways to manage and reduce risk in relation to Planning Committee decisions.

1.3 The Working Group was asked to report the findings and recommendations arising from the review to this meeting of the Democracy Committee.

1.4 The Working Group has met twice to carry out the review. At the first meeting the Group considered a briefing paper prepared by the Head of Policy, Communications and Governance covering current arrangements, examples of arrangements at other local authorities and possible options. A copy of the briefing note is attached as **Appendix A**. James Bailey (Development Manager) and Russell Fitzpatrick (Lawyer, Team Leader, Planning) attended the second meeting to provide further background information and to advise on issues such as pre-determination, Member training and possible options.

1.5 The procedure for referral of planning applications to a second body for determination was introduced in 2006 to provide a further safeguard against the possible risks associated with not being able to sustain Planning Committee decisions at appeal. The award of costs against the Council, following the granting of a planning permission on appeal, had a significant impact on the Council's financial resources at that time.

1.6 Although the first stage of the process (deferral of the decision of the Planning Committee to its next meeting) has been invoked on several occasions, the second stage (referral of the application by the Head of Planning and Development on the advice of the Legal Officer present to

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the Planning Referrals Committee for determination) has been invoked twice (in relation to the Boughton Lane and Woodcut Farm appeals) given the anticipated very significant costs involved.

- 1.7 The Working Group was mindful that when the Planning Committee's decision to defend the Woodcut Farm appeal was referred to the Planning Referrals Committee by the Head of Planning and Development, there was a lot of public interest and extensive lobbying, and the three Members of the Committee felt under considerable pressure.
- 1.8 The Working Group agreed that there is a need to provide a check and balance mechanism in relation to Planning Committee decisions, and that there should continue to be provision for the referral of an application to a second body for determination in circumstances where the Committee votes to continue with a decision that it has been advised cannot be sustained at appeal and which could have significant cost implications for the Council's budget. However, that body should be the Policy and Resources Committee and the Planning Referrals Committee should be abolished.
- 1.9 In reaching this conclusion, the Working Group reviewed the Council's existing Committee framework and took into account manageability of the process (including using the existing framework), representation, Member training and pre-determination issues. The Group considered the advantages and disadvantages of an alternative referral body and of increasing the size of the Planning Referrals Committee, details of which are summarised in **Appendix B**.
- 1.10 During its discussions, the Working Group sought guidance on pre-determination and the implications for Members and Substitute Members of the Planning Committee who might also be Members or Substitute Members of the alternative referral body.
- 1.11 The Localism Act 2011 clarified the rules on pre-determination. The rules were developed to ensure that Councillors come to Council discussions on any matter with an open mind. Section 25 of the Act provides that a Councillor should not be regarded as having a closed mind simply because they previously did or said something that, directly or indirectly, indicated what view they might take in relation to any particular matter. This reflects the common law position that a Councillor may be predisposed on a matter before it comes to Committee, provided they remain open to listening to all the arguments and changing their mind in light of all the information presented at the meeting. In terms of any Members and Substitute Members of the referral body having participated in a decision of the Planning Committee which has been referred to it, even in the event of a named vote being taken at the Planning Committee, it does not necessarily mean that they will be pre-determined. Each individual case would need to be looked at, but it is ultimately the responsibility of the individual Councillor to decide, and Substitutes could be used if required.
- 1.12 In formulating its recommendations, the Working Group took into account the need to provide appropriate training on the policies, procedures, legislation and guidance relevant to the work of the Planning Committee

for Members and Substitute Members of the referral body. It was accepted that it would be impossible to train all 55 Members of the Council, and that the Members and Substitute Members of a smaller referral body could participate in the mandatory training arranged for Members and Substitute Members of the Planning Committee, including training on pre-determination of planning applications. The Working Group also felt that as far as possible Planning Committee processes should apply to the referral body; for example, the existing provisions relating to public speaking at meetings of the Planning Committee should apply for consistency and fairness. Further, it was agreed that the decision of the referral body should be final.

- 1.13 The Group considered the wording of the sections of the Constitution/Local Code of Conduct for Councillors and Officers Dealing with Planning Matters relating to Planning Decisions Which Have Significant Cost Implications. It was suggested, and agreed, that the delegation to the Head of Planning and Development upon the advice of the Legal Officer present to refer an application to a second body for determination (currently the Planning Referrals Committee) should be amended to be in consultation with the Chairman of the meeting; however, the decision would remain with the Head of Planning and Development. Initially, the Working Group thought that the delegation should be exercised in consultation with the Chairman and Vice-Chairman of the Committee, but accepted that these Members might not be in attendance at the meeting.
- 1.14 Any decision to abolish the Planning Referrals Committee will necessitate a review of the allocation of seats on Committees.

2. AVAILABLE OPTIONS

- 2.1 The Committee is asked to consider and agree the recommendations made for submission to Council.
- 2.2 The Committee could decide that no action be taken on the recommendations of the Working Group, however this would not be appropriate having regard to the concerns which have been expressed about the current Planning Referral process.

3. PREFERRED OPTION AND REASONS FOR RECOMMENDATIONS

- 3.1 The recommendations reflect the views of the Working Group appointed by this Committee to undertake a review of the arrangements for managing risk in relation to Planning Committee decisions, including the Planning Referral process. It is considered appropriate that the Committee give consideration to the recommendations arising from the review.

4. RISK

- 4.1 The procedure for referral of planning applications to a second body for determination was introduced to provide a further safeguard against the

possible risks associated with not being able to sustain Planning Committee decisions at appeal. The recommendations of the Working Group are intended to address concerns which have been raised about the current arrangements.

5. CONSULTATION RESULTS AND PREVIOUS COMMITTEE FEEDBACK

5.1 The Working Group has balanced the need to provide a check and balance mechanism in relation to Planning Committee decisions against concerns expressed about the existing arrangements and formulated recommendations which, if adopted, will improve the process, be fully representative and increase public and Member confidence.

6. NEXT STEPS: COMMUNICATION AND IMPLEMENTATION OF THE DECISION

6.1 The recommendations of the Democracy Committee, arising from its consideration of the findings of the review, will be reported to the Council for final decision.

7. CROSS-CUTTING ISSUES AND IMPLICATIONS

Issue	Implications	Sign-off
Impact on Corporate Priorities	The Council has in place processes to manage risk. The recommendations contained within this report are intended to assist in managing risks associated with Planning Committee decisions.	Head of Policy, Communications and Governance
Risk Management	The recommendations of the Working Group are intended to address concerns which have been raised about the current arrangements in place to manage risk in relation to decisions of the Planning Committee.	Head of Policy, Communications and Governance
Financial	Some decisions of the Planning Committee could have significant implications for the Council's budget. The recommendations of the Working Group are intended to safeguard the Council against the possible risks associated with not being able to sustain	Paul Holland, Senior Finance Manager (Client)

	Planning Committee decisions at appeal.	
Staffing	No specific issues arise.	Head of Policy, Communications and Governance
Legal	It is essential that effective procedures are in place to provide a check and balance system with the view to reducing the legal and financial risks to the Council. The legal implications with regards to pre-determination are set out within the body of the report.	Interim Deputy Head of Legal Partnership
Privacy and Data Protection	No specific issues arise.	Interim Deputy Head of Legal Partnership
Equalities	No detrimental impact identified with the recommendations set out in the report. However, the communication of changes to Council policy to residents should include hard to reach groups to ensure our services and process are transparent and accessible to all.	Equalities and Corporate Policy Officer
Crime and Disorder	No specific issues arise.	Head of Policy, Communications and Governance
Procurement	No specific issues arise.	Head of Service & Section 151 Officer

1. REPORT APPENDICES

The following documents are to be published with this report and form part of the report:

- Appendix A: Planning Referrals Committee – Short Briefing Paper on Current Arrangements, Examples of Arrangements at Other Local Authorities and Possible Options
- Appendix B: Planning Referrals Committee – Advantages/Disadvantages of Alternative Referral Bodies

2. BACKGROUND PAPERS

None

Planning Referrals Committee – Short Briefing Paper on Current Arrangements, Examples of Arrangements at Other Local Authorities and Possible Options

1. Introduction

This paper sets out possible options for the arrangements for managing risk in relation to planning decisions. It also sets out the Council's current arrangements, examples of arrangements at other local authorities in Kent and some beyond who have similar procedures. The research is by no means exhaustive and it is apparent that everywhere approaches planning delegations and procedures differently in relation to committee arrangements.

2. Maidstone's Current Arrangements

The current arrangements are set out in section 2.2.8 of Part 2 of the Constitution (Composition and Purpose/Functions of the Planning Referrals Committee), section 29.3 of Part 3.1 of the Constitution (Planning Decisions Which Have Significant Cost Implications) and section 17 of the Local Code of Conduct for Councillors and Officers Dealing With Planning Matters (Planning Decisions Which Have Significant Cost Implications) as follows:

2.2.8 of Part 2 of the Constitution (Composition and Purpose/Functions of the Planning Referrals Committee)

Membership: 3 Councillors

Purpose: To 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.

Section 29.3 of Part 3.1 of the Constitution - Planning Decisions Which Have Significant Cost Implications

- (a) If the Head of Planning and Development, on the advice of the Legal Officer present at the meeting, believes that the Planning Committee's reasons to justify refusal/the imposition of conditions are not sustainable, the decision of the Planning Committee will be deferred to its next meeting. The Committee itself may also agree to defer consideration of an application for the same reasons.
- (b) If, at that meeting, the Planning Committee votes to continue with a decision which it has been advised cannot be sustained at appeal and which could have significant cost implications for the Council's budget, the Head of Planning and Development, on the advice of the Legal Officer present, will request Councillors to refer the consideration of the application to Part II of the meeting, to offer Councillors further advice on the legal and financial implications, and the likelihood of success at appeal. If the Committee still decides to refuse the application/impose an unreasonable condition, the Head of Planning and Development will on the advice of the Legal Officer

present, immediately after the vote has been taken, refer the application to the Planning Referrals Committee for determination.

Section 17 of the Local Code of Conduct for Councillors and Officers Dealing With Planning Matters - Planning Decisions Which Have Significant Cost Implications

- (a) If the Head of Planning and Development, on the advice of the Legal Officer present at the meeting, believes that the Planning Committee's reasons justifying a resolution to refuse/impose conditions are not sustainable, that decision of the Planning Committee will be deferred to its next meeting. The Head of Planning and Development will give advice on this before any vote is taken. The Committee itself may also agree to defer consideration of an application for the same reasons.
- (b) If, at that next meeting, the Planning Committee votes to continue with a decision which it has been advised cannot be sustained at appeal and which could have significant cost implications for the Council's budget, the Head of Planning and Development, on the advice of the Legal Officer present, will request Councillors to refer the consideration of the application to Part II of the meeting (private session), to offer Members further advice on the legal and financial implications, and the likelihood of success at appeal. If the Committee still decides to refuse the application/impose an unreasonable condition, the Head of Planning and Development will on the advice of the Legal Officer present, immediately after the vote has been taken, refer the application to the Planning Referrals Committee for determination.

Note: The wording in Section 17 of the Local Code of Conduct for Councillors and Officers Dealing With Planning Matters is slightly different from that in Section 29.3 of Part 3.1 of the Constitution

3. Examples from other Councils in Kent

Swale

No Planning Referral Committee, the Head of Planning can defer the item to next meeting as set out below:

If the vote does not follow the Officer recommendation then:

- (a) The Chairman will invite the Head of Planning to consider if the application should be deferred in accordance with Part 3 of the Constitution. If the application is deferred to that next meeting, the Head of Planning will advise Members of the prospects of such a decision being challenged on appeal and on the implications of a cost application being made against the Council.
- (b) If the decision is not deferred to the next meeting, a further motion must be made to refuse the application. A detailed minute of the Planning Committee's reasons (which should be full, clear and convincing) should be made by the Democratic Services Officer and a copy placed on the

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application file. The courts have expressed the view that such reasons should be clear and convincing. The Chairman should also give the Planning Officer the opportunity to explain the implications of any decision contrary to his/her recommendation.

Shepway

Take particularly controversial applications to full Council.

Tunbridge Wells

No referral process or option for an Officer to defer an item.

Ashford

No Planning Referral Committee, Officers can recommend deferral to a later meeting of the Planning Committee as set out below:

"In cases where Members propose to make a decision contrary to Officers' advice, Officers may **request** deferral (which would remain at the discretion of the Committee) but only in the following exceptional circumstances where the complexity of the case demands:

- In order to formulate proper summary reasons and/or appropriate conditions and/or planning obligations in relation to a grant of permission.
- In order to formulate effective full reasons in relation to a refusal of permission in the light of Members' views at the meeting.

Requests would be made only in exceptional circumstances where the issues arising are so complex that Officers consider the Council's interests are best served by a deferral to allow time to prepare such." In such cases the "first" Committee would make a resolution that it is minded to grant/refuse whilst the "second" Committee would make the formal decision and give reasons and agree conditions etc. This is necessary as a matter of law to avoid the situation of one Committee formulating reasons etc. for a decision taken by a different Committee which would be legally problematic. (Minute No. 72/6/08 refers).

Tonbridge and Malling

No obvious referral process.

Sevenoaks

Procedures are focussed on pre-meeting action with advice on how to raise concerns and the option for Officers to withdraw a report. At the meeting itself an Officer can recommend that a decision be deferred but only the Chairman can decide whether or not to accept that recommendation.

Gravesham

Regulatory Board has no referral or Officer deferral mechanism.

4. Sample of Councils with Planning Referral Committees

Chichester

In the event that the Committee is minded to determine an application in a manner which is contrary to the Officers' recommendation and the Officers have identified this as being a major departure from the Development Plan or inconsistent with the policies of the Council, the application will be referred to the Council's Planning Applications Referral Committee for determination with a recommendation from the relevant Area Development Control Committee.

Harrogate

Have a Planning Committee and Planning Referral Committee. The Planning Referral Committee has 16 Members on a politically proportional basis and membership is drawn from the widest practicable geographical spread of Ward Members.

The Borough Solicitor or their representative makes a decision to refer the application where a decision the Committee wish to make is contrary to policy or could lead to costs being awarded against the Council, the application will be deferred by the Solicitor present at the meeting and brought to another meeting of the Committee or the Referrals Committee. The Committee meet fairly regularly and consider referrals from the Planning Committee as well.

St Albans

Have a Planning Referral Committee to deal with amongst other items particularly contentious applications.

5. Possible Options

When reviewing possible options consideration needs to be given to how we will provide a check and balance for Planning Committee decisions and reduce financial and legal risk for the Council.

1. Increase the size of the Planning Referrals Committee.
2. Retain current arrangements.
3. Change the referral body. Head of Planning and Development to refer decisions to Policy and Resources Committee following the same procedure as for referral to the Planning Referrals Committee and abolish the Planning Referrals Committee. Consideration would need to be given to training for Policy and Resources Committee Members.

Adopt a model similar to one of the Kent Councils above focussed on pre-meeting identification and resolution of issues with a back stop of the Head

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of Planning and Development being able to recommend or defer an application where there is a major risk to the Council and that item is deferred to a later meeting of the Committee (essentially the first part of our present process).

**PLANNING REFERRALS PROCESS - ADVANTAGES/DISADVANTAGES OF
ALTERNATIVE REFERRAL BODIES**

Advantages of Referral to Full Council – Extraordinary Meeting	Disadvantages of Referral to Full Council – Extraordinary Meeting
<p>Relieves pressure on a small group of Members (Planning Referrals Committee comprising three Members).</p> <p>Provisions relating to public speaking would apply – details to be determined.</p>	<p>Unwieldy.</p> <p>Could result in delays in decision making and additional costs, including loss of the planning fee, which could be substantial, if an extension of time has not been agreed with the applicant</p> <p>Issues relating to pre-determination to be resolved - would need to discuss with the individual Members involved.</p> <p>Logistics of training 55 Members on relevant planning issues.</p>
<p>Note: The Working Group was initially under the impression that at Shepway District Council particularly controversial applications are reported to full Council for determination. However, it was established that at Shepway planning applications are delegated within the Council’s Constitution to the Planning and Licensing Committee. There is no provision for referral by an individual. The only applications that have been reported to full Council (Lydd Airport and the sea front) were due to resolutions of the full Council for these applications to be determined there as there were major issues relating to employment and site sensitivity. In the case of a critical application, this approach could be adopted, but the issues described above would apply.</p>	
Advantages of Referral to Other Body – Policy and Resources Committee – Special Meeting	Disadvantages of Referral to Other Body – Policy and Resources Committee – Special Meeting
<p>Relieves pressure on a small group of Members (Planning Referrals Committee comprising three Members).</p> <p>Provisions relating to public speaking would apply – details to be determined.</p> <p>Responsible for co-ordinating financial management and performance across the Council. Policy and Resources Committee Members and Substitute Members</p>	<p>Issues relating to pre-determination to be resolved – would need to discuss with the individual Members involved, but Substitutes could be used.</p> <p>Perception that the determination of planning applications is driven by financial considerations.</p>

<p>could be included in the mandatory training arranged for Members and Substitute Members of the Planning Committee.</p> <p>It would be necessary to make clear that applications were being referred to the Policy and Resources Committee for final determination (with no provision for referral of the Committee’s decision to full Council).</p> <p>All Groups represented and membership includes all Group Leaders.</p>	
<p>Advantages of Referral to Other Body – Strategic Planning, Sustainability and Transportation Committee – Special Meeting</p>	<p>Disadvantages of Referral to Other Body – Strategic Planning, Sustainability and Transportation Committee – Special Meeting</p>
<p>Relieves pressure on a small group of Members (Planning Referrals Committee comprising three Members).</p> <p>Provisions relating to public speaking would apply – details to be determined.</p> <p>Responsible for overseeing, inter alia, the development, review and implementation of the Council’s strategic planning policies, including the Council’s Development Plan.</p> <p>Strategic Planning, Sustainability and Transportation Committee Members and Substitute Members could be included in the mandatory training arranged for Members and Substitute Members of the Planning Committee.</p> <p>It would be necessary to make clear that applications were being referred to the Strategic Planning, Sustainability and Transportation Committee for final determination (with no provision for referral of the Committee’s decision to the Policy</p>	<p>Issues relating to pre-determination to be resolved – would need to discuss with the individual Members involved, but Substitutes could be used.</p> <p>Issues relating to the Committee being asked to arbitrate on the application of its own policies.</p>

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and Resources Committee).	
Advantages of Increasing the Membership of the Planning Referrals Committee	Disadvantages of Increasing the Membership of the Planning Referrals Committee
<p>Relieves pressure on a small group of Members (Planning Referrals Committee currently comprises three Members).</p> <p>Membership excludes Members and Substitute Members of the Planning Committee so pre-determination should not be an issue.</p> <p>Provisions relating to public speaking would apply – details to be determined.</p> <p>Planning Referrals Committee Members and Substitute Members could be included in the training arranged for Members and Substitute Members of the Planning Committee.</p>	<p>Difficult to find additional Members to serve on the Committee and there may be unwillingness on the part of Political Groups to be allocated seats on a Committee that has only been required to meet twice in ten years to exercise its functions.</p>

The Working Group also considered the advantages and disadvantages of a third party independent review as follows:

Advantages of a Third Party Independent Review	Disadvantages of a Third Party Independent Review
<p>Relieves pressure on a small group of Members (Planning Referrals Committee currently comprises three Members).</p> <p>Objective approach by an independent party.</p>	<p>Cost implications and issues associated with ratification of the third party's conclusions.</p>