

Report to the Constitution and Members Services Standing Scrutiny Panel



Date of meeting:
4 October 2011

Portfolio Holder: Leader

Subject: Council Landowner and Planning Authority Roles

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Recommendations:

- (1) To consider the issue of property roles and regulatory responsibilities of the Council;
- (2) To consider asking the Standards Committee to review:
 - (a) existing advice on member interests concerning planning so as to reinforce the difference between those roles;
 - (b) the need for similar advice for the Council's licensing responsibilities;
- (3) To ask for a further report on any amendments to the constitution needed to clarify these roles;
- (4) To ask all Directorates to review their dealings with the public to ensure that the difference between property decisions and regulatory matters are separate and that a decision by the Council as landowner does not mean that any relevant regulatory decision will automatically follow.

Introduction

1. Over several meetings during the past year, concern has been expressed by the Leader of the Council about the importance of distinguishing between the landowner and planning roles of the Council in dealing with property matters. The Overview and Scrutiny Committee asked in April 2010 asked for a report to be submitted to this Panel on the implications of this issue.
2. In recent discussions within the Council, this issue has arisen in connection with covenants on land but will also be relevant to the Council's general role as landowner, particularly where the Council seeks to realise property assets. Cases involving covenants included Epping Forest College and 35 Denny Avenue, Waltham Abbey. The latter case also raised the issue of the Council's dual roles of planning and housing authority.
3. As the Cabinet is actively involved in a number of possible transactions regarding the Council's property portfolio and these questions may arise again. Similar issues have arisen in regard to its licensing functions.
4. In summary, the Council is a regulatory body (e.g. planning and licensing) which differ

from the Council its status as landowner and service provider.

Implications of the Different Council Roles

5. Recognising these differing roles is key to the Council decision making. Decisions by the Council on service provision must be made on the basis of legality, probity and financial and technical considerations. The regulatory framework takes account of different considerations such as planning and licensing policy and the discretions which may be exercised requires a completely different approach by decision-makers.

6. The Council's role as landowner is also distinct from the regulatory framework. Decisions on its property holdings should not imply that supporting regulatory decision must follow. Separate processes are followed and the outcome of regulatory decisions should not have any regard to the Council's property role.

7. Apart from decision making, these roles bring with them probity considerations. This has been apparent in discussions about member interests and the public perception of service or property decisions affecting regulatory ones.

Covenants

8. Covenants are legal obligation imposed in a deed by a seller of land or property on the purchaser. The legal obligation is to do (or not do) something. These obligations frequently attach to the land and are enforceable on the buyer (including subsequent owners). Generally these covenants are registered for Land Charge searches. Such covenants can also be included in leases.

9. In commercial properties, covenants can seek to control the use of premises, the type of commercial activities undertaken, preventing certain types of trading and avoiding nuisances. In residential properties, covenants are generally included to ensure the management objectives of the seller (e.g. alterations, maintenance standards and the appearance of the residence).

10. In the case of 35 Denny Avenue, the covenants debated by the Council reflected the Council's management requirements of the Council as housing authority. In the case of Epping Forest College, the covenants were concerned with the type of activities which would be carried out there.

Enforcement and Challenge – Property and Regulatory Functions

11. With covenants and other property matters, the route to enforcement and challenge to decisions taken by the Council as landowner is through the Lands Tribunal and/or the Courts. Such actions are always linked to interests in the land and remedies include injunctions and damages.

12. Regulatory decisions in respect of Planning or Licensing matters are made pursuant to statutory powers which usually allow some discretion to be exercised within limits. These decisions may be subject to a statutory appeal process or be open to challenge by way of Judicial Review. In relation to planning applications/enforcement applications, appeals are made to the Planning Inspectorate in the first instance. None of these decisions directly affect title to the property but may have an effect on the use to which the property can be put

Constitution

13. Fundamental to the Local Government Act 2000 is the distinction between the Executive and Regulatory roles of the Council. This Act established the basis of the Authority's current constitution.

14. As a result, the Council's regulatory functions (including planning and licensing) are specifically excluded from the duties and responsibilities of the Cabinet. Thus, the Council may seek, for example, planning consent for any site in its ownership but it will not be the Cabinet which considers whether approval is given. The same situation applies to other service decisions which have regulatory implications.

15. The Council's own planning applications are referred to in the terms of reference of the appropriate Area Plans Sub-Committee. They are not dealt with by officers under delegated powers and must be referred to the appropriate Sub committee. This reflects the constitutional position but is also designed to make such decisions transparent where the public is concerned. This requirement is reflected in the Planning Protocol, it is not reflected in the Constitution proper.

Code of Conduct

16. Local authorities are unusual in that property ownership and regulatory responsibilities exist within the same organisation. For Councillors this creates difficulties in terms of separating these roles. For Cabinet members advice in the Planning Protocol states that involvement in decisions which result in planning applications should be considered a prejudicial interests so far as the planning decision is concerned. This is because there would be a clear connection between the outcome of a planning application and the Cabinet decision thereby raising concerns about "fettered discretions". Cabinet responsibility might influence other portfolio holders not to take part in such decisions but this is not covered.. Current guidance focuses on the Portfolio Holder with responsibility for the service decision concerned (see Section 7 of the Protocol).

17. Section 24 of the Protocol sets out the distinction between landowner roles and the planning process.

Further Action

18. It may be useful if the Panel considered the following reviews:

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- (a) the Planning Protocol – this is under review by the Standards Committee.
 - (b) the Constitution – this is a matter which would fall within the terms of reference of this Panel.

19. The Panel may like to consider the following action:

- (a) asking the Standards Committee to expand advice in the planning protocol on the Council's property role in respect of member interests;
- (b) asking the Standards Committee to look specifically at the interests in relation to the Licensing Committee and Sub Committees;
- (c) asking the Standards Committee to review existing advice in the Planning Protocol in terms of the collective responsibility for decisions which have regulatory implications;
- (d) to seek a further report to this Panel on any proposals for clarifying in the constitution on the Council's property role in planning and licensing; and
- (e) ask directorates to review their correspondence with the public so as to make sure that they are aware that a decision of the Council as property owner does not mean that a related regulatory decision automatically follows (e g shops).

