

## **GUIDANCE FOR PLANNING AND DEVELOPMENT CONTROL COMMITTEE MEMBERS ON CIRCUMSTANCES REQUIRING A DECLARATION OF INTEREST - FIRST DRAFT**

For reasons best explained by lawyers, the planning process is increasingly fraught with legal challenges to decisions made - invariably in good faith - by planning authorities. As a broad generalisation, it can be said that the risk of challenge is greatest to decisions made when planning committee members are acting in quasi-judicial mode which, principally, is when they are determining planning applications. Anxiety about this aspect of the CNPA's business is proving to be of particular concern to those members who are councillors or are members of other organisations whose activities intersect in some way with our planning role. It also threatens to be a disruption to the conduct of the Committee's business by, at the simplest level, repeated interruptions and, more seriously, by making the proceedings iniquorate.

The opinions expressed below are offered, on an interim basis, to help the CNPA's Planning and Development Control Committee (PDCC) to make judgements about the circumstances in which they need "to declare an interest" and absent themselves from discussions and voting on planning matters. I am putting them forward with the following caveats:

1. These are my personal views (as a non- lawyer) although I have discussed them with the Chief Executive who, broadly, shares my conclusions.
2. They are based on (a) my reading of the guidance contained in the documents listed in Appendix A of this report, (b) a degree of pragmatism based on my experience of the planning system and the bodies with which it interacts, and, (c) a belief that in a community as small as that from which the Park draws its members, democratic government would become almost impossible if those prepared to spend their time on public service could be disabled from making decisions on one body merely because they sit on a separate body with which it has dealings and from which it receives opinions on specialist subjects.
3. I will, in the immediate future, be seeking a legal opinion, and the views of the Standards Commission for Scotland, on the reliability of my views. I suspect that any opinion I receive will be subject to a caution that they touch on many "grey" areas where only the courts can make a determination.
4. Apart from Development Control, there are certainly other areas of planning - notably local planning and enforcement - where there is scope for legal challenges but these are less pressing and will be dealt with in future as the need arises.

### **THE SOURCE OF THE PROBLEM**

It is clear from the meetings of the PDCC which have taken place so far that those members of the committee who are either councillors on one of the constituent local authorities or are board members of, for example, SNH, are taking the view that there might be a conflict of interest if they participate in discussions and/or voting on those aspects of the committee's business related to (a) call-ins, (b) the determination of applications or (c) the making of

comments to local authorities on applications not called in. For reasons which I will explain below, I think the risk does not exist in the case of (a) and is much less than has been assumed in the case of (b) or (c).

Before doing so, however, I need to suggest that the underlying basis for any concern is that applicants, objectors and other interested parties are entitled to expect that each member of the committee, when making quasi-judicial decisions, comes to the meeting with (1) no pre-formed view on how he or she will vote, (2) that his or her decision will be based upon the advice given by their officers - or a reasoned departure from it, (3) as a consequence of (2), the decision will be made in accordance with approved policies - or a reasoned departure from them. The condition of having no pre-formed view is obviously impossible to satisfy if the member has already participated in a vote in another forum, or has publicly expressed an opinion on the issue, and **might** be difficult to satisfy (a court might conclude) where a member's independence of action was compromised by the fact that he or she was a member of another body with a declared view on whether the proposal should be approved or rejected. As a variation to the latter case, it **might** be sufficiently compromising that the other body had a clear policy, formally approved in accordance with its constitution, on developments of the type under examination - or would derive a clear benefit from a particular outcome.

## **DISCUSSION AND IMPLICATIONS FOR PDCC**

### ***Call-In Decisions***

My views on the implications of the above analysis for the PDCC's proceedings can only be expressed with different levels of confidence. I am most certain that, in relation to call-in/no call-in decisions, a member need only declare an interest where he or she has a financial interest or the applicant is a friend, relative or business associate -with the test in these cases being whether an informed, independent person, knowing the facts, would be likely to conclude that the connection is sufficiently close to perhaps affect the member's impartiality. In all other circumstances, I do not think there will be a need to make a declaration. My reasoning for that conclusion is that call-in/no call-in decisions are only properly made if the decision is reached without any judgement about how the application deserves to be determined. In other words, these decisions are specifically **NOT** about the planning merits of the proposal which, as the convener regularly cautions, must be made on another occasion when all of the consultations have been carried out and an officer report and briefing has been given. The call-in activity happens only within the PDCC, and is based only on an interpretation of the approved Protocol. I do not see how participating in those decisions impinges on the decisions which might be taken in other places on planning or other aspects of the proposal. I am aware of - but do not agree with - the proposition that there is a connection between which body deals with an application (the CNPA or the relevant Council) and the ultimate decision on whether to approve or refuse. This has to be based on an assumed predisposition by one body or the other to a particular attitude to some types of development. Of greater importance than whether that is ever true, it may be that the applicant, objectors or other interested parties will believe that their viewpoint will be best served by the Council or the CNPA making the decision and, to that extent, the call-in will not be seen by some people as being as "value-free" as I have suggested. However, my guess is that any legal challenge arising from that point would be to the collective decision of the committee rather than to the role of individuals and would probably be on the grounds that the committee had misdirected itself in its interpretation of the Protocol.

### ***Determination of Applications***

In relation to the determination of applications which have been called-in or making comments on those which are not, I would make one general point which will influence several others: the Scottish Parliament has given the CNPA a constitution which provides for councillors and nominees of other organisations to be on the Board and related committees. It would, in my opinion, rather defeat Parliament's intention if so many of these members were then prevented from active participation in core activities of the CNPA's business by excessively cautious interpretations of codes of conduct. Against that background, I think the most certain guidance might be as follows:

1. Always declare an interest if you have the "friends, relatives, financial interest or business association" connection referred to above or if proposed development has such a direct bearing on your home that it might be held to affect your impartiality.
2. Always declare an interest if you have participated in an official (and perhaps non-official) discussion at which a conclusion, involving you, was reached on the matter at hand.
3. Always declare an interest if your views on what the planning decision should be have been already been expressed - e.g. to the applicant, objectors, community councils, the Press or in any way which would lay you open to the criticism that you had come to the PDCC with a pre-conceived opinion.
4. Always declare an interest if you intend, for example as a councillor, to participate in a debate on the proposal in a Council forum at a later date. The point of doing so in these circumstances is to prevent your impartiality being challenged subsequent to that event rather than in the PDCC.

Beyond the above points, the issues are less clear and probably need to be assessed in the particular case. There has, for example, been concern that where a body, such as SNH, has expressed its view on a planning application as a result of an official consultation this may be held to require those members of PDCC who have an official connection with SNH to declare an interest and withdraw from the PDCC determination. This, I think, is an unnecessarily severe interpretation of official guidance unless the member concerned has taken part in formulating that view wherever it originated. In practice, most inputs of this type to planning consultations come from officers and unless one is prepared to argue that Board or PDCC members are inevitably bound to the views of their officials I do not think this need be a worry in the overwhelming majority of cases where the dilemma appears to occur. It is inherent in public governance in our democratic system that, broadly, officials give advice and committees of one sort or another take decisions based on that advice. Within our own short experience there have been a significant number of cases where officer recommendations have been rejected in favour of different outcomes and it is well known to anyone with experience of the planning system that committee members regularly disagree with the advice they have been given and vote accordingly. That is not to say that they are making bad decisions, or acting on whim - since they are under an obligation to make determinations in accordance with their declared policies unless there are material considerations which justify exceptions - but there is very often a degree of judgement required and the system is tolerant of committees taking a different view from their officers provided there is a clear and reasoned justification which makes sense on planning grounds. The same principles apply in related fields which are relevant to this report. The important point arising from these facts is that, for example, PDCC members who are also members of

other bodies are not mandated to turn up at the PDCC to reiterate the views of those bodies. It is quite possible that any PDCC member in this situation will not even know what the other body has said until he or she has read it in our committee papers and I think that, in those circumstances in particular, any challenge to that member's participation could not be held to be tainted by a connection to the other body. I find it difficult to think of an exception to that point except, perhaps, where an issue is unusually controversial - e.g. comparable to the funicular railway issue - where it might be wise not to participate in the PDCC determination if you hold a position on another body. The exception in this case would be more to do with a different degree of public perception and a greater focus on the positions being taken by bodies which will influence the outcome.

## **CONCLUSION**

The above advice is less equivocal than any I have been able to find in "official" sources all of which tend to set out very broad principles and leave it to the individual judgements of those who might be affected. That is partly due to the obvious fact that in many cases only the Courts can make definitive interpretations of the guidance but it is also the case that officials who draft guidance sometimes err heavily on the side of caution or vagueness to avoid being faulted in the light of subsequent experience. In my efforts to miss the latter trap I have perhaps expressed opinions with a greater degree of certainty than can be justified but, if that is the case, my motive has been to give guidance which will be useful and capable of consistent interpretation by the PDCC and its advisors. There is no doubt, however, that I will need to circulate these opinions to our legal advisors, and The Standards Commission, for more expert opinion and I, or my successor, will report back to a future meeting of the Committee on their responses. Members of the PDCC who have a role on other bodies are, of course perfectly free to show this report to appropriate officers in those bodies for their opinions which I would be interested to hear.

**DENIS MUNRO**  
**Interim Planning Manager**

## **APPENDIX A**

### **OFFICIAL GUIDANCE REFERRED TO**

Model Code of Conduct for Members

Code of Conduct for Councillors

"On Board" guide to Board Members

Supplementary Guidance from the Standards Commission for Scotland