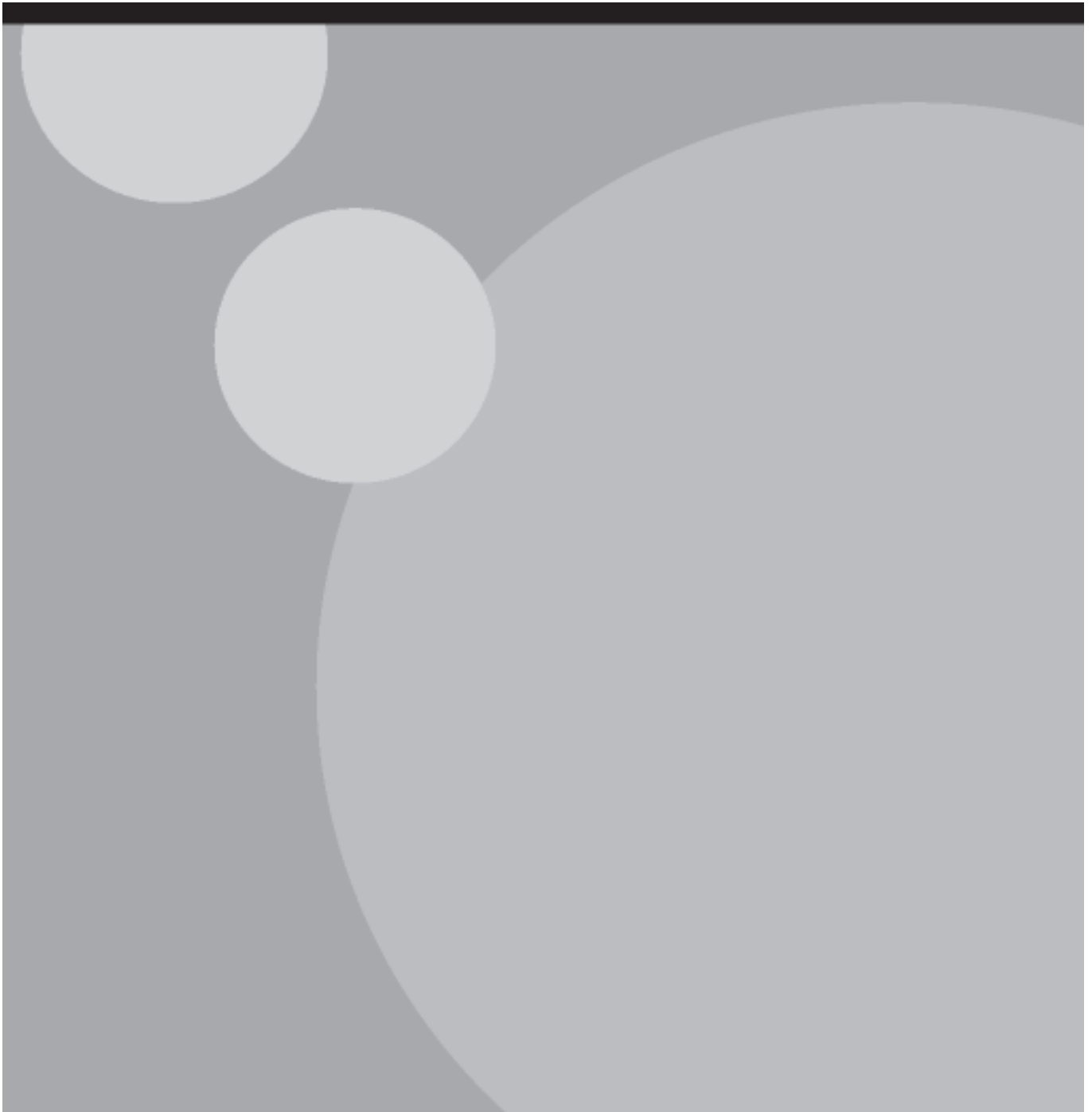




Guidance on Planning Propriety Issues





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February 2012
Department for Communities and Local Government

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Introduction

1. This guidance note concerns propriety issues that can arise when the Secretary of State exercises decision-making functions under the planning legislation – in particular decisions on planning appeals made to the Secretary of State, and applications which are called in for decision by the Secretary of State. The note provides advice for Ministers in DCLG charged with making those decisions, considers the position of Ministers in other Departments, and the position of Parliamentary Private Secretaries, Ministerial Special Advisers and officials.
2. The Secretary of State has overall responsibility for decisions taken under the Planning Acts. Decisions are taken by both him and by other Ministers in the Department on his behalf. In this note the term “Planning Ministers” refers collectively to the Secretary of State and other Ministers in the Department exercising planning decision making responsibilities on his behalf.

General principles

3. The Ministerial Code, issued by the Cabinet Office on behalf of the Prime Minister in May 2010, sets out a number of principles which must be observed in relation to the general requirement that Ministers undertake their official duties in a way that upholds the highest standards of propriety. Of particular importance in relation to the handling of planning casework is that Ministers “must ensure that no conflict arises, or appears to arise, between their public duties and their private interests”. They must also “keep separate their role as Minister and constituency Member”.
4. Planning ministers are under a duty to behave fairly (“quasi-judicially”) in the decision-making procedure. They should therefore act and be seen to act fairly and even-handedly. For example, to demonstrate even-handedness all evidence which is material to any decision which has been the subject of a planning inquiry, and which the decision-maker ultimately takes into account, must be made available to all parties with an interest in the decision. Privately made representations should not be entertained unless other parties have been given the chance to consider them and comment. This part of the requirement to act fairly is also reflected in the statutory rules for inquiries, which require the Secretary of State to give the parties a further opportunity to make representations if, after the close of an inquiry, the Secretary of State differs from the inspector about any relevant matter of fact or proposes to take into account any new evidence or new matter of fact. A challenge will succeed if a court is satisfied that Planning Ministers have acted procedurally unfairly – for example by

giving a developer an opportunity to put forward his case which has not been granted to other interested parties.

5. Planning Ministers should also bring an unbiased, properly directed and independent mind to consideration of the matter before them. This does not mean that Planning Ministers are not entitled to have and express opinions about general planning issues, or planning cases. But they must approach and must be seen to approach matters before them with an open mind.
6. There is a clear parallel with Section 25 in the Localism Act 2011, which confirms that a Councillor should not be held to have a closed mind just because they have previously indicated a view on a matter relevant to a decision.
7. The overall objective of this guidance is to help Planning Ministers ensure that decisions are properly taken and to avoid, as far as possible, the risk of successful legal challenge of decisions. However, no set of principles or guidance is a substitute for common sense.

Constituency and private interests

8. Planning Ministers should take no part in making a planning decision in which they have or might be perceived to have a private or constituency interest. That includes decisions in respect of planning matters with which he or she has previously been associated, as an MP or in a private capacity. Nor should Planning Ministers use their ministerial position to influence such a decision. The allocation of planning responsibilities is designed to avoid any Minister having responsibility for planning casework in the area where he or she has a home, or a constituency.
9. In their role as Members of Parliament with constituency interests, Planning Ministers may wish to express their opinions on local plans and planning applications to a local planning authority, an Inspector or another Planning Minister as appropriate. Specific advice on this is contained in the Ministerial Code (paragraph 6.6). Planning Ministers are not precluded from making representations on matters affecting their constituents' interests. But they must make clear that they are acting as their constituents' representative and expressly not as a Planning Minister, and that they will not take part in any subsequent decision on the matter in their ministerial capacity. In dealing with relevant local planning authorities on planning matters in their constituencies, Planning Ministers should take particular care not to give any impression of wielding Ministerial influence. They are quite free to make representations as Member of Parliament for the constituency so long as these are made openly and on the basis that they will be made available to all interested parties for comment.
10. Planning Ministers are required to declare any personal interest in a planning case, for example relevant land or property ownership or shares in an interested company. Decisions in those cases will be taken by another Planning Minister, as appropriate.

Representations on call-in decisions and appeals

11. Although planning cases decided directly by the Secretary of State are a tiny proportion of the number of planning applications and appeals handled each year, they are naturally high profile and interested parties, including MPs and pressure groups, will want to make representations. Those seeking to make representations to Planning Ministers in relation to whether an application should be called-in should be directed to the relevant planning casework official in the Planning Directorate of DCLG. Ministers' decisions should have regard to the published call-in policy. Those seeking to make representations in relation to the actual determination of called-in applications and recovered appeals should be advised to write to:
- the Planning Inspector, if the inquiry has not been completed; or
 - the relevant official in the Planning Casework Division if the inquiry has concluded.
12. Where representations are made by whatever means, including letters, telephone and email, whether direct to a Planning Minister or to the relevant official, it should be made clear that they can only be taken into account if they can also be made available to all interested parties for comment.

Impact on day to day performance of Ministerial duties

13. In undertaking their wider Ministerial duties, Planning Ministers may be involved in meetings where development projects are described, or they may visit the site of a proposed development. Different considerations, and different legal risks, apply depending on the stage a development project has reached.
- (a) Formative stage: Where a development project is at the formative stage, well before any application for planning permission has been made, if Planning Ministers attend meetings involving interested parties then they may comment in general terms on the potential development. However Ministers should avoid discussing the detail of any potential planning application and should avoid expressing views which could be perceived as prejudicial to the determination of any such application.
- (b) Planning application made (but still with local planning authority): Because this is closer to the stage when Planning Ministers may be involved, greater care needs to be taken. Ministers should therefore

exercise caution in deciding whether to attend meetings and in any general remarks they make. Planning Ministers should make it clear that, at this stage, decisions are entirely a matter for the local planning authority concerned and that they cannot express views which could be perceived as prejudicial to the determination of the planning application.

(c) Appeal made or application called-in: At this stage Planning Ministers are much more exposed to the risk of legal challenge if they agree to meet interested parties. They are therefore advised to decline requests for visits involving meetings with interested parties at this stage. Where a meeting is unavoidable (e.g. because an application is part of a wider agenda), Planning Ministers should not discuss the particular planning case, and should explain the propriety concerns to those present.

14. Whatever the stage of the application, Ministers should make it clear that in the event of their having to make a decision on any subsequent planning application should it come before the Secretary of State, they will consider all the evidence at that time with an open mind before reaching a decision.
15. In any case where a meeting is held, a note of the meeting should be kept. In some cases this may need to be circulated to the interested parties.
16. If Planning Ministers want to visit a site before making a decision on a case, they should either make an unaccompanied visit or visit in the company of the applicant, the local planning authority and any other interested party who wants to attend. The Minister should avoid discussing the merits of the case on such occasions.
17. In exercise of their policy functions DCLG Ministers without planning responsibilities may have legitimate reasons for showing an interest in development projects. In visiting proposed projects or in discussing the application of national policy to those projects, they should take care to make clear that they will have no role in the planning decision-making process and that they are unable to discuss the planning aspects of the proposal with Planning Ministers within the Department.

Dealings with other Ministers and other government departments

18. The question sometimes arises of how far it is appropriate for Planning Ministers to discuss cases with Ministerial colleagues. Unless the decision is a joint decision (see below¹), decisions in planning cases are for Planning Ministers alone, and taking into account only material planning considerations. Matters relating to the application of Government policy should be addressed during the public inquiry. It may nevertheless be

¹ Decisions relating to development of operational land by statutory undertakers must be taken jointly with the appropriate Secretary of State responsible for sponsoring that statutory undertaker if either Secretary of State so directs in any particular case.

appropriate for Planning Ministers to seek and receive advice on matters of policy which are relevant to the decision to enable an informed judgment to be made. However, for the reasons set out in paragraph 4, this is limited to Government policy that is already in the public domain. If, in the course of such discussion new issues emerge which are relevant to the case but have not previously been exposed, if these matters are to be taken into account these will need to be made available to interested parties for comment.

19. Some major projects require decisions from Ministers in other Government Departments as well as DCLG. The advice in this guidance applies where (whether under the Planning Acts or other consent regimes) joint decisions are needed with Ministers in other Government Departments. In these cases it is appropriate for the Ministers concerned with joint determinations and for officials dealing with those decisions to be able to discuss their handling with each other. In such cases a proper record of such discussions and outcomes must be made.

Parliamentary Private Secretaries

20. Parliamentary Private Secretaries to Ministers in DCLG (whether planning and non-planning) are not to be involved in making planning decisions, or in the consideration of planning cases. The Ministerial Code makes clear that “Parliamentary Private Secretaries are not members of the Government. However, they must ensure that no conflict arises, or appears to arise, between their role as a Parliamentary Private Secretary, and their private interests.” The Code goes on to state that “Parliamentary Private Secretaries, particularly those in departments with planning responsibilities, should take special care when making representations to Ministers about planning issues. In particular, they should not discuss planning cases with interested parties or imply that they have any influence over planning decisions.” In representing their constituency interests, they should abide by the advice in paragraphs 8 - 10 above and Sections 3 and 6 of the Ministerial Code. The Ministerial Code also requires that Permanent Secretaries be advised of any such interests.

Special Advisers

21. Planning decisions must be made solely on the basis of valid planning matters, and not by reference to political or presentational considerations. This applies regardless of the source of the advice and that of special advisers is treated in the same way as advice from an official giving internal advice to Ministers. This applies to political advisers and to any specialist advice (for example on design matters) provided to Planning Ministers.

22. Occasionally, special advisers whether in DCLG or other Departments are approached (for example by letter or telephone call) by parties to a planning case. Any such approach should be referred to the appropriate official in the Planning Casework Division for action. A special adviser so approached must not give the impression that any particular advice will be decisive when decisions are taken. Where a special adviser has a private interest in a planning matter he or she must play no part in its consideration by the Department, though they are free to make representations in the usual way. They must also advise the Permanent Secretary of any such interest.

Officials

23. The activities of officials in handling planning casework and in providing advice to Planning Ministers are governed by the Civil Service Code and the relevant Staff Handbook. But in addition, this guidance does cover the role of officials at all appropriate stages in taking planning decisions.

Steve Quartermain
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20 February 2012