

**Planning Decisions with Significant Cost Implications**

<b>Final Decision-Maker</b>	Council
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<b>Classification</b>	Public
<b>Wards affected</b>	All

**Executive Summary**

This report follows the Member agenda item request to review the planning referrals process; it sets out the Committee and procedural options for managing the risks arising from planning decisions with significant cost implications.

**Purpose of Report**

Decision

**This report makes the following recommendations to this Committee:**

1. That an option for the planning referral process and subsequent actions as contained in section 3 of this report be approved; and
2. That Planning Committee be consulted as to their views on the current training requirements for Members on the Planning Committee and asked to recommend any changes to the constitution to Council.

**Timetable**

<b>Meeting</b>	<b>Date</b>
Democracy and General Purposes Committee	2 September 2020
Council	30 September 2020

# Planning Decisions with Significant Cost Implications

## 1. CROSS-CUTTING ISSUES AND IMPLICATIONS

Issue	Implications	Sign-off
<b>Impact on Corporate Priorities</b>	The appropriate governance of decisions, including risk management, supports all priorities indirectly.	Democratic and Electoral Services Manager
<b>Cross Cutting Objectives</b>	The appropriate governance of decisions, including risk management, supports all objectives indirectly.	Democratic and Electoral Services Manager
<b>Risk Management</b>	The report considers the options to appropriately manage the risks arising from the decision-making processes for planning decisions with significant cost implications. Risks are covered generally throughout the report and specifically in paragraph 5.	Democratic and Electoral Services Manager
<b>Financial</b>	<ul style="list-style-type: none"> <li>• One of the key risks arising from planning decisions with significant cost implications is financial. Whilst planning decisions cannot take into account impact on the Council's budget they nevertheless can impact it significantly. The purpose of the referrals process is to manage that risk.</li> <li>• The definition of 'significant cost' is not currently clearly set out in the constitution and any recommended option chosen by the Democracy and General Purposes committee would remedy this.</li> </ul>	Democratic and Electoral Services Manager
<b>Staffing</b>	None	Democratic and Electoral Services Manager
<b>Legal</b>	<p>The constitution will be amended to reflect the option chosen. All of the options presented are within legal requirements and would continue to provide a sound planning application determination process.</p> <p>The Council, discharging functions as the local planning authority, whether through a Committee and/or by an officer has the</p>	Head of Legal Partnership (and Monitoring Officer)

	<p>obligation to consider applications in line with the statutory requirements.</p> <p>The Town and Country Planning Act 1990, section 70(2) requires that in dealing with applications for planning permission, the authority shall have regard to:</p> <p>(a) the provisions of the development plan, so far as material to the application,</p> <p>(b) a post-examination draft neighbourhood development plan, so far as material to the application, and</p> <p>(c) any other material considerations.</p>	
<b>Privacy and Data Protection</b>	No impact identified.	Policy and Information Team
<b>Equalities</b>	No impact identified as a result of the recommendations set out in this report.	Equalities and Corporate Policy Officer
<b>Public Health</b>	No impact	Democratic and Electoral Services Manager
<b>Crime and Disorder</b>	No impact	Democratic and Electoral Services Manager
<b>Procurement</b>	No impact	Democratic and Electoral Services Manager

## 2. INTRODUCTION AND BACKGROUND

2.1 In considering planning matters the Planning Committee and any referrals committee must follow the regulatory procedures in order to ensure robust decisions that can withstand challenge. This includes circumstances where the Committee chooses not to agree with officer recommendations to approve a planning application i.e. goes against officer recommendations. The committee must both:

- have robust reasons for refusal, based solely on planning grounds; and

- have sound reasons for going against the officer recommendation. This requirement has been established through case law.

The reasons must be clearly documented.

A subset of these decisions are those where the Committee wish to go against the officer recommendation and there is the risk, on the basis of the reasons given, of a significant award of costs against the Council at appeal. It is those minority decisions that the Council introduced its planning referrals process for.

- 2.2 In 2006 the planning referrals process was introduced following a significant award of costs (£500k) against the Council, after a Planning Committee decision against an officer recommendation. The response was to put in place a planning referrals process designed to reduce the risk of a similar decision occurring again by having another body look at the application. This process, in its subsequent forms, has been used three times in fourteen years. The most recent occasion involved the Policy and Resources Committee meeting in its role as Planning Referral body with respect to two planning applications (outline and full) for development at Church Road, Otham. On two previous occasions meetings of the Planning Referrals Committee were held to check the reasons for refusal once an application was already at appeal (see Appendix 2 for a brief summary of those occasions).
- 2.3 The Planning Referrals process was reviewed by Councillors in 2017, and it was also revisited in the recent Committee Structure Review (2019) where in both cases Members agreed to the process being retained and that its home should be the Policy and Resources Committee. The training requirements for councillors who sit on Planning Committee also apply to councillors on the Policy and Resources Committee, when acting as the Planning Referrals body, as a consequence.
- 2.4 A repeat of the 2017 research exercise has been carried out to compare the Council's referrals process with that of other authorities. This is included at Appendix 1. The matter of planning applications being determined contrary to an officer recommendation is not a unique process to Maidstone and is a process that needs to be managed across all authorities. This is because of the regulatory

nature of planning decisions and the need to ensure that they can stand up to appeal and challenge in the courts. Where Maidstone's process differs is that, as a result of the significant costs award in 2006, Maidstone's current process focusses on decisions with significant cost implications rather than all decisions contrary to officer recommendations. In such instances the option of deferral is available if required and the Committee is reminded by the legal officer of the need to express clear and cogent planning reasons for why they are going against the advice of officers, following established case law. It is because of this additional governance for managing the risk of significant costs that Maidstone's process appears to stand out as being more rigid in its requirements. Experience demonstrates that the need to apply the process is a rare event i.e. it has been applied, in some form, on 3 occasions in 14 years.

- 2.5 No other authority that has been researched has a planning referral process the same as Maidstone's. Only one of the authorities has a Planning Referrals Committee but that is set up to have applications of a particular nature referred to it as an alternative to the Planning Committee (optional alternative committee). Eight authorities were looked at in total and can be summarised as follows:

Optional deferral	Conditional deferral	Optional referral	No special procedure	Optional Alternative Committee
3	2	1	1	1

Whilst a few authorities have an optional deferral process it should be noted that the option for deferring an application until the next meeting is available on all applications considered by the Maidstone Planning Committee. Of those reviewed the model used at Swale Borough Council (conditional deferral) most closely matches option 4 (remove the referrals body) considered later.

- 2.6 Further to the Church Road, Otham applications being referred to, and determined by, Policy and Resources on 13 July 2020 feedback on the process has been received from Members, Officers and individual members of the public on the process. This feedback primarily falls into four areas:

- That the Policy and Resources Committee is less experienced than the Planning Committee at determining planning applications;
- That the process is confusing – particularly as to why Policy and Resources are used, and what Policy and Resources are looking at;
- That matters of predetermination along with Visiting Member/Substitute Member provisions causes concerns about Members rights to address the Committee; and
- That the current protocol and provisions in the Constitution when followed correctly, give the impression of frustrating the Planning Committee.

2.7 Notably there has not been an argument that the original reason for the referrals process does not exist, namely that planning decisions with significant cost implications do represent a risk that needs to be managed. The question then becomes how that risk is managed and whether any chosen option manages that risk sufficiently whilst retaining decision making with an appropriate body. As a regulatory function it is crucial that decision making processes are robust.

2.8 Whichever option is chosen, it is for Council to determine its delegations and the management of the risks. Officers and Committee Members will be bound by Council's decisions as part of the Constitution.

### 2.9 **Planning Training**

The Committee also requested as part of the consideration of the Member Agenda Item Request that the planning requirements to be able to sit on the planning committee were brought forward for consideration. The options for considering this are set out below.

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## **3. AVAILABLE OPTIONS**

### 3.1 Options for the Referrals Process:

1. Do Nothing – retain the current arrangements
2. Minor changes – clarify and strengthen wording in the Constitution. For example setting out thresholds for 'significant' costs and the process that would be followed in

steps that are easier to follow (i.e. being clear on what status the planning committee 'decisions' have)

3. Make a change to the Referrals body – change the referrals body away from the Policy and Resources Committee
4. Remove the referrals body – remove the referrals body, but retain the deferral and provision of Counsel's advice to a second meeting of the Planning Committee
5. Remove the deferral process – remove the deferral process and have the original Planning Committee decision stand following advice from Legal and Head of Planning and Development at the meeting

### 3.2 **Option 1 – Do Nothing**

The existing process does provide an escalation route, and enables the decision to be considered three times, twice by the Planning Committee and then by the Policy and Resources Committee acting as the Planning Referrals body.

What the current process does not address is that the final decision, the one that would potentially go to appeal, is made by the least experienced Planning body of the two.

- 3.3 A do nothing option would mean that the Constitution retains the same wording as now. This would not address the need for greater clarity on the definition for Significant Applications at Planning Committee and the relevant considerations for the decision taker (i.e. the Policy and Resources Committee) when a referral occurs. Addressing these points would improve transparency.

- 3.4 For example, feedback was received on the recent referral that it was assumed Policy and Resources Committee would be considering costs as they have budget responsibility, rather than solely determining the application on planning matters as they are required to.

- 3.5 Lastly, matters of predetermination need to be considered in the constitution more generally. The need to do so was accentuated by the most recent experience of applying the planning referral provisions. Namely that whilst a Member with Other Significant Interest (OSI) can address the Committee and then absent themselves without taking part in the decision, a pre-determined member who is on the final decision-making Committee (i.e. Policy and Resources Committee) cannot.

### 3.6 **This option is therefore not recommended.**

### 3.7 **Option 2 – Minor Changes**

This option would retain the current process and bring forward detailed amendments to the Constitution to overcome the lack of clarity and transparency described in option 1 above. The wording in the Constitution would be amended to provide definitions of significant costs, the status of the Planning Committee 'decisions' at each stage, the nature of the considerations of the planning referral body (i.e. they will be considering planning matters), being explicit about determining the application from scratch. Further, matters arising from pre-determination and the inability of pre-determined Committee Members to address the Committee and then absent themselves (as for OSIs) could be explored through this option. Changes to the constitution would be made to reflect the committee's decision and then presented to Full Council for final approval.

### 3.8 **If Members wish to retain a separate Planning Referrals Body this option could be considered on its own or it can be combined with option 3 or 4.**

### 3.9 **Option 3 – Change the Referrals Body**

Historically the Council has previously had three Members as the Planning Referrals body before changing this to the Policy and Resources Committee in 2017. The Democracy Committee and committee review also considered whether decisions with significant cost implications could be referred to Council as an alternative. It would also be possible to consider a sub-committee of Policy and Resources, or of Planning Committee to determine the application. There are pros and cons of such options (reducing the number of Members can be viewed as reducing the democratic input, or sending it to Council would require all Members to be trained in planning to take part in the decision making process at Council).

3.10 Advantages of a reduced body include more directed training and the ability to choose experienced planning Members. Full Council making the decision would provide the greatest perceived weight of support for the decision (though in reality a decision of any Committee has the full weight of Council at appeal). It should also be noted that this was considered in the 2017 review and the Policy and Resources Committee was chosen as part of that process.

### 3.11 **This option should be considered in combination with Option 2 if Members are satisfied with a referrals process as the means of managing the risks from a decision with significant cost implications, but not happy with it being Policy and Resources Committee.**



**3.12 Option 4 – Remove the Planning Referrals Body (and retain deferral process step)**

Removing the planning referrals body would mean the final decision on a decision with significant cost implications remains with the Planning Committee. The planning committee is the most experienced and trained committee the Council has on planning matters and determines all Council applications that are not delegated to officers except for those that have been referred in the past.

3.13 The rest of the process for decisions with significant cost implications would be retained. Namely that the Head of Planning and Development would defer the item to the next meeting of the Committee and seek legal advice on the specific reasons for refusal, or conditions the Planning Committee have put forward. This would then be available for the Committee to consider at its next meeting. If the Planning Committee then wished to proceed the decision would go ahead. This option has the benefits of addressing most of the concerns raised with the existing process – but the risk management element needs to be carefully considered.

3.14 It is recommended that this be combined with option 2 such that the wording in the constitution be changed to significant, the status of the first decision of the committee and other wording changes that may be required.

**3.15 This option should be considered if Members feel it is sufficient to manage the risks arising from decisions with significant cost implications. If this option is chosen it is recommended that it be combined with option 2.**

**3.16 Option 5 – Remove the deferrals process**

This option goes one step further in allowing the original decision to go ahead as is without the benefit of additional legal advice, or additional time for the Planning Committee to consider it. The process would be that the officers and legal advisors present at the meeting would inform the committee that the decision was likely have significant cost implications, the Committee would then move into Part II if necessary to hear legal opinion without prejudicing any future case, and then come back to confirm their decision at that meeting. Whilst this would address a number of the points of feedback raised it would remove the additional legal advice on the reasons for refusal/conditions, which can often be of a level complexity that exceeds that possible to give in a committee environment and could therefore increase the risks of the decision causing a significant cost award against the Council through failure if appealed.

**3.17 This option is not recommended as it is considered to reduce the risk management of decisions with significant cost implications too far whilst doing little more than option 4 to address the feedback received.**

### 3.18 Planning Training Options

The Planning Committee currently sets its own programme of training and requirements to be able to sit on the Committee. These currently extend to the Planning Referrals Body (in this case Policy and Resources) but depending on the option chosen above that could change.

3.19 Given that Planning Committee determine their own training requirements it is recommended that the Planning Committee be consulted and asked for their views on the any matters the Committee wishes to raise regarding training – for example is the required training too much, or too little, whether the lengths of time for renewing mandatory training could be changed, whether the current requirements are too complicated.

3.20 If changes are necessary because of that consultation the Planning Committee could recommend them to Council directly.

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## **4 PREFERRED OPTION AND REASONS FOR RECOMMENDATIONS**

4.1 The recommended options for planning decisions with significant cost implications are either option 2 – Minor changes, or option 4 in combination with option 2. Each option is analysed above, but in summary Members should determine whether a Planning Referrals process is necessary to manage the risks arising from decisions with significant cost implications and choose accordingly. Whether a referrals process is required or not the constitution should be amended to make the process and definitions clearer. Matters of pre-determination and right of members to address a committee can also be looked at as part of that option.

4.2 For planning committee training it is recommended that the Planning Committee be consulted as to their views on the current training requirements for Members on the Planning Committee and the Planning Committee be asked to recommend any changes to the constitution to Council, if necessary.

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## **5 RISK**

- 5.1 The risks arising from planning decisions with significant cost implications are threefold – financial, reputational and loss of control on significant applications (i.e. that they are determined by another body).
- 5.2 In considering which option to take Members need to be satisfied that the risks of the Planning Committee reaching a decision that will be lost at appeal, with costs awarded are properly mitigated through which ever option is taken. Current mitigations include, training for the committee, attendance by legal and planning officers at committee, professional planning officers producing reports to an agreed format, internal checking within planning.
- 5.3 The current approach is then for the decision, following a warning from officers of significant cost implications, to be deferred, then if necessary, referred before a final decision is made.

## **6 CONSULTATION RESULTS AND PREVIOUS COMMITTEE FEEDBACK**

- 6.1 Feedback received during and since the Church Rd, Otham applications were considered, the most recent example of the current procedure being used has been summarised within the body of the report.

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## **7 NEXT STEPS: COMMUNICATION AND IMPLEMENTATION OF THE DECISION**

- 7.1 The next steps will be to
- (i) consult with the planning committee regarding training; and
  - (ii) to make the consequential changes to the constitution to reflect this committee's decision.
- 7.2 The amended constitution will then go to Council for adoption.

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## **8 REPORT APPENDICES**

Appendix 1: 2020 Planning Decisions Against Officer Recommendation Research Summary

Appendix 2: Planning Referrals History Case Summary

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## **9 BACKGROUND PAPERS**

Democracy Committee – 15 November 2017 – Planning Referrals  
Process Review – [Online Here](#)