Audit and Governance Committee

29 March 2016

Is the final decision on the recommendations in this report to be made at this meeting? No

*Proposed changes to the Constitution (Planning Committee membership & procedure rules) as recommended by the Constitutional Review Working Party

<table>
<thead>
<tr>
<th>Final Decision-Maker</th>
<th>Full Council</th>
</tr>
</thead>
<tbody>
<tr>
<td>Portfolio Holder(s)</td>
<td>The Leader, Councillor Jukes, and Councillor McDermott</td>
</tr>
<tr>
<td>Lead Director</td>
<td>Jonathan MacDonald</td>
</tr>
<tr>
<td>Head of Service</td>
<td>Jane Lynch</td>
</tr>
<tr>
<td>Lead Officer/Report Author</td>
<td>Jane Lynch</td>
</tr>
<tr>
<td>Classification</td>
<td>Non-exempt</td>
</tr>
<tr>
<td>Wards affected</td>
<td>All</td>
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</tbody>
</table>

This report makes the following recommendations to the final decision-maker:
1. That the amendments to the Constitution set out in this report be agreed and recommended to Full Council.

This report relates to the following Five Year Plan Key Objectives:
- A Prosperous Borough – by encouraging future growth and investment, progressing the Local development Plan and working with developers to secure suitable development schemes
- A Confident Borough – ensuring robust decision making processes for planning applications are in place such that all relevant matters are properly and thoroughly considered.

Timetable

<table>
<thead>
<tr>
<th>Meeting</th>
<th>Date</th>
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<tbody>
<tr>
<td>Discussion with Portfolio Holder &amp; Director of Planning &amp; Development</td>
<td>18 December 2015</td>
</tr>
<tr>
<td>Discussion with Leader &amp; Portfolio Holder</td>
<td>14 January 2016</td>
</tr>
<tr>
<td>Audit and Governance Committee</td>
<td>29 March 2016</td>
</tr>
</tbody>
</table>
1. PURPOSE OF REPORT AND EXECUTIVE SUMMARY

1.1 Under the Tunbridge Wells Borough Council Constitution, the Audit and Governance Committee is responsible for “oversight of the effectiveness of the constitution and making appropriate recommendations for change”. The Constitutional Review Working Party (“the CRWP”) meets regularly to review the Constitution.

1.2 The CRWP has recently reviewed elements of the Constitution at the request of officers (acting on instructions from the Portfolio Holder for Planning and Transportation on proposed changes 1, 2 and 3 as set out below) and supports the recommended changes as revised and set out in this report.

1.3 The Council has a statutory duty to secure continuous improvement in the way in which its functions are exercised having regard to a combination of economy, efficiency and effectiveness.

2. INTRODUCTION AND BACKGROUND

2.1 Six changes to the Constitution were proposed and put to the CRWP. All relate to the Planning Committee and its membership and procedure rules. Three of the proposals were supported by the CRWP entirely, two with amended wording and the remaining proposal was not supported.

2.2 The proposals were circulated to all Members in advance of the meeting of CRWP which was held on 19 February 2016 and were discussed at the Conservative Group meeting held on 18 February 2016. Comments received, as well as those made at the Group meeting, were considered by the CRWP and informed their recommendations.

2.3 The proposed changes are set out in detail below along with the comments received from members, the outcome of the CRWP and in the revised form where alteration was recommended by CRWP. The recommendations for consideration at this meeting, revised where necessary, are highlighted in bold under each heading.

2.4 To show the proposed changes as revised following CRWP, two versions of extracts from the Constitution are attached to this report. One has tracked changes (Appendix A) and the other is a clean version (Appendix B).

The Proposed Changes

2.5 Proposed Change 1 as presented to the CRWP: Amendments to paragraph 4 Part 3 of the Constitution (November 2015) to reduce the number of Members on Planning Committee from 16 to 12 members of the Council, 6 being elected representatives of the wards in the eastern area and 6 being elected
representatives of the wards in the western area. Additionally it was proposed that there would be four substitute members who, subject to conditions, may attend meetings at the request of the Chairman or Vice-Chairman to take the place of the ordinary member for whom they are the designated substitute.

2.6 This proposal had arisen at the suggestion of the Portfolio Holder to provide greater efficiency and consistency in decision making. The Constitution in its current form (part 3 para. 4) allows for 16 members of the Council being elected representatives of the Planning Committee but there is no provision made for substitutes.

2.7 Concerns were raised by Members about the need for their communities to be represented on the committee and that any reduction in numbers would have a commensurate impact on the number of wards with representatives making planning decisions.

2.8 It is considered that the outcomes sought from this change would result in a tighter core of members leading to a reduced length of debate by eliminating repetitiveness and inclusion of non-planning matters of local concern, especially on the more contentious applications. Furthermore, through a reduction in the number of wards that could be represented with only 12 members of the Planning Committee, its role as a regulatory rather than representative function would be highlighted and enhanced thus making it easier for members to remain impartial when considering a contentious application within their wards and reducing the risk of decisions being made on parochial rather than planning grounds.

2.9 It should also be noted that no limit on the number of Members who can address the committee during the public speaking section for each application being considered by the Committee was proposed, so Members not on the Committee could put their views to the meeting without the constraints placed upon those being part of the decision making body. In terms of the robustness of decisions made and the risk of challenge arising from members of the committee raising non-planning matters during debate and influencing the decision on these grounds, addressing the Committee as an elected ward representative during this part of the agenda is a safer and a more effective means of raising issues.

2.10 Concerns were also raised about the introduction of substitutes on the grounds that for substitute members to maintain the required level of knowledge, practical experience and training would be a challenge, especially in respect of ongoing frequent legislative changes, and that greater consistency in decision making was more likely if taken by the same group of people.

2.11 In discussion at CRWP, Cllr March advised that some members of Conservative Group and the public still thought along the line of urban and rural distinctions and the current mix of representatives from the urban and rural wards should be maintained. She put forward the view that a more gradual reduction in numbers would be more likely to be an acceptable compromise and suggested an initial reduction of two members with membership of the Committee maintaining a good geographical spread.

2.12 Accordingly CRWP agreed that the number of members on the Planning Committee be reduced from 16 to 14 with two substitutes and that wording be included to ensure a spread of members across the wards.

2.13 The change as now proposed is therefore worded as:

Amendment to the number of Members on Planning Committee such that it comprises 14 members of the Council, seven being elected
representatives of the wards in the eastern area and seven being elected representatives of the wards in the western area (eastern and western being defined in para 4.1, Part 3 of the Constitution). Except in exceptional circumstances there will be no more than one elected member from any one ward. There will be two substitute members who, subject to conditions may attend meetings at the request of the Chairman or Vice-Chairman to take the place of the ordinary member for whom they are the designated substitute.

2.14 CRWP agreed that the impact of the changes should be monitored over the forthcoming year with a further review to be undertaken early in 2017.

2.15 Proposed Change 2 as presented to the CRWP: A new requirement for inclusion in the Planning Committee procedure Rules as a new paragraph 2 (with subsequent re-numbering of the following paragraphs) that Members are expected to be in attendance for the duration of the meeting unless, in exceptional circumstances, the Chair agrees to the early departure of a Member from the meeting.

2.16 This proposal had arisen at the suggestion of the Portfolio Holder to achieve robust decision making and improved consistency in decisions.

2.17 This proposal also helps to avoid the public perception that members of the Committee were leaving the meeting early once key items had been considered and that the same level of attention was not being given to other applications under consideration. In turn this would avoid potential damage to the Council’s reputation as a sound decision maker.

2.18 Whilst the need for this new requirement has been questioned, it is considered that the inclusion of the proposal as a rule of procedure would carry greater weight and gravitas than such incidences being dealt with on an informal basis as it formally sets out the expectation that a member should attend for the whole meeting and that if they were unable to do so, they could ask for a substitute to be nominated to attend in their place.

2.19 This proposed change was agreed without change but again with the impact of the changes to be monitored over the forthcoming year and a further review to be undertaken early in 2017.

2.20 Proposed Change 3 as presented to the CRWP: Amendment to existing paragraph 2(iii), first bullet (new para. 3) under Planning Committee Procedure Rules. Reduction in the number of public speakers from four to three each for objection and support.

2.21 This proposal had arisen at the suggestion of the Portfolio Holder to provide greater efficiency and a reduction in repetitive and/or irrelevant representations.

2.22 The public have ample opportunity to submit their views and comments during the application process. When an application is heard at Committee, public speakers generally highlight previously made views and with four potential speakers each in support and objection this often leads to repetition.

2.23 No reduction was proposed as far as to the number of Parish/Town and Borough Councillors allowed to speak.

2.24 Concerns were raised that the need for efficiency does not outweigh the need for correctness of decision making from the public viewpoint and that hearing more views enables a better decision to be made. The view of a number of members of Conservative Group was that the public perception would be that the proposal would stifle democracy by reducing the number of speakers.
Furthermore, the point was made at CRWP that only very limited time and cost savings would be achieved and accordingly CRWP recommended that this proposal not be taken forward. This recommendation has been heeded and the change is no longer proposed.

2.25 **Proposed Change 4 as presented to the CRWP: Amendment to existing paragraph 2iii), final point (proposed to be new para. 3) under Planning Committee Procedure Rules to clarify that Members may address questions of clarification to officers only (rather than speakers) at the conclusion of each representation.**

2.26 The practice of members addressing questions directly to speakers ceased two years ago on the grounds that the practice raised potential legal challenge by virtue of speakers being given an unfair time advantage to express their views and that if an issue was raised by a speaker that required a response this should be provided by a planning officer. Whilst it may seem sensible to address questions to the speaker who has raised an issue it is difficult and inappropriate to challenge them about the veracity of their statements although to act upon it without questioning its authenticity could lead to an unsound decision. If Officers are unable to answer a question relating to a material planning matter, it would where appropriate be likely for consideration of the application to be deferred.

2.27 This proposed amendment is sought simply to support and clarify the current process. This does not override the Chairman’s prerogative to ask questions of speakers on occasions when there are simple questions of fact that could be clarified without risk.

2.28 CRWP supported recommendation of this proposal which has therefore been carried forward without change.

2.29 **Proposed Change 5 as presented to the CRWP: New additional point under 2iii), (proposed to be new para. 3) under Planning Committee Procedure Rules stating that if an application is deferred for any reason there will be no further opportunity for members of the public, Borough or Town/Parish Councillors to address the meeting unless there is a material change to the officer recommendation.**

2.30 Concern on this proposal was raised based on the interpretation of the proposal as meaning that this applied to members of the committee. This is not the intention. The reference to Members was to those addressing the meeting under the public speaking part of the procedure rather than those who sit on the Committee.

2.31 This proposed amendment addresses the situation where an application is deferred at some point during its consideration – generally during the debate, should it become clear that there are matters raised that cannot be adequately addressed without, for example, the provision of further information or a site visit. In essence the proposal is that the consideration of the item be suspended at the point at which it is deferred. Thus, if public speaking has already been concluded and the item has reached or gone beyond part iv) as set out in the Constitution (see below), when the item comes back to a later meeting consideration will recommence at the stage at which it was deferred, albeit with an updated report and an overview presentation being made by Officers. Only if there is a material change to the officer recommendation (which would reflect
any significant new planning issue or circumstance that may have come to light) would the item be wholly reconsidered afresh.

2.32 In summary the procedure followed at committee and as set out in the Constitution is:

1. After the standing items the presentation of applications for the Committee’s consideration will be as follows:
   i) Chairman introduces item.
   ii) Officer presents the report on the application.
   iii) Previously registered speakers have three minutes to address the Committee in the following order:
       • Members of the public (objectors followed by supporters)
       • Parish/Town Council representatives
       • Borough or ward members who are not also Committee members
   iv) Officers to make any points of clarification or correction arising from the presentations made by members of the public, parish/town representatives or borough/ward members.
   v) Questions from any Committee member to officers.
   vi) Discussion of the application by Committee members.
   vii) Voting.

2.33 CRWP supported recommendation of this proposal, subject to the wording being clarified to address the above concern.

2.34 The revised recommendation is:

If an application is deferred for any reason to a subsequent Planning Committee meeting consideration of the item will recommence at the stage of the procedure at which it was deferred unless there is a material change to the officer recommendation in which case the full procedure will be followed.

2.35 Proposed Change 6 as presented to the CRWP: A new paragraph 4 to the Planning Committee Procedure Rules introducing a “Planning Safeguard” whereby if Members propose to determine an application contrary to officer recommendation and both the Head of Planning Services and the Head of Legal Partnership, or their respective representatives, agree that the proposed reasons for the decision is not supported by sound planning reasons and that there is a significant likelihood of costs being awarded against the Council at any subsequent appeal, the decision of the Committee will be deferred to a subsequent meeting in order that officers may give further consideration to the issues raised by Members. At the subsequent meeting only Members who attended any site visit pre-arranged by officers will be permitted to ask questions, debate or vote and, as above under proposed amendment 5, there will be no further opportunity for members of the public or, Borough or Town/Parish Councillors to address the meeting unless there is a material change to the officer recommendation.

2.36 The purpose of this proposal is to protect the reputation of the Council and avoid costs resulting from appeals consequent upon Committee decisions made contrary to officer recommendation in situations where officers considered reasons for refusal would be unsustainable. The weight of public opinion at Committee meetings can put members under pressure and resulting committee decisions could be perverse and difficult to defend in planning terms. The risk is not just to the reputation of the Council but also risk of significant costs being awarded as a result of an unsustainable decision.
2.37 The proposal seeks to provide a cooling off period by deferring the final decision and any detailed reasons or conditions to a subsequent meeting. Following the process outlined under point 5 above would allow the application to be determined in a controlled fashion.

2.38 Many other Councils have a similar sort of review procedure although often this includes the decision being taken by Full Council rather than going back to the Planning Committee. The proposed preference for taking the decision back to the Planning Committee rather than to Full Council is based on it not being expedient or timely to provide the necessary planning training required under the Constitution to all members of the Council to enable them to make a sound decision and to avoid the potential for an appeal to be lodged on grounds of non determination.

2.39 It is envisaged that an application deferred under these circumstances would generally be included on the following agenda.

2.40 CRWP supported recommendation of this proposal without any alteration although the wording of the last sentence needs to be changed to clarify the situation with regard to members of the Committee being able to debate as under change 5 above. The amended recommendation is therefore:

If Members propose to determine an application contrary to officer recommendation and both the Head of Planning Services and the Head of Legal Partnership, or their respective representatives, agree that the proposed reasons for the decision is not supported by sound planning reasons and that there is a significant likelihood of costs being awarded against the Council at any subsequent appeal, the decision of the Committee will be deferred to a subsequent meeting in order that officers may give further consideration to the issues raised by Members. At the subsequent meeting only Members who attended any site visit pre-arranged by officers will be permitted to ask questions, debate or vote and, as above under proposed amendment 5, consideration of the item will recommence at the stage of the procedure at which it was deferred unless there is a material change to the officer recommendation in which case the full procedure will be followed.

3. AVAILABLE OPTIONS

3.1 The issues and risks identified above need to be considered and addressed by the Council with agreed amendments being made to the Constitution to secure the improved practices and procedures.

Do Nothing

3.2 After consideration of the issues and risks, the Council could choose to do nothing and continue to operate Planning Committee on the same basis and in accordance with the same Rules. However, the potential impacts on the Council’s reputation as a decision maker and the attractiveness of the Borough for future development to meet the needs identified in adopted and emerging planning policy documents would remain at risk of being damaged; significant awards of costs against the Council may result and the soundness of decisions made will remain as open to challenge as they currently are. With the exception of the reduction in the number of Members elected to the Planning Committee, the proposed changes either reflect current practices or will only come into play
under specific circumstances which are expected to be occur very rarely. For these reasons, this option is not recommended.

3.3 Furthermore, the “do nothing” option would mean leaving the rules and procedures unchanged thereby potentially failing in the statutory duty to secure continuous improvement in the way in which its functions are exercised.

Options for Proposal 1

3.4 The number of members elected to the Committee could remain unchanged at 16 maintaining the status quo i.e. the “do nothing” option.

3.5 The reduction to 14 members could be agreed but the reintroduction of substitutes could be rejected to reflect the difficulties for the substitutes in keeping up to date with changes in planning legislation and in gaining the knowledge and experience necessary to make sound decisions.

Options for Proposal 2

3.6 By virtue of its nature the only options for this proposal are to accept or reject it.

Options for Proposal 3

3.7 This report does not recommend taking this proposal forward following the concerns raised by members and CRWP.

3.8 The option to agree it as set out remains.

Options for Proposal 4

3.9 To continue with the practice proposed but without changing the Constitution as set out above i.e. the “do nothing” option.

3.10 To agree to revert to the procedure as set out in the Constitution which allows for Members to ask questions of speakers. Attention is drawn to the risks of doing this as set out in paragraph 2.28.

Options for Proposal 5

3.11 By virtue of its nature the only options for this proposal are to accept or reject it.

Options for Proposal 6

3.12 If the principle of a “Planning Safeguard” is accepted, there is an option to do as some other Councils do and refer any item deferred under this clause to a different decision making body.

4. PREFERRED OPTION AND REASONS FOR RECOMMENDATIONS

4.1 The Committee is asked to approve and recommend to Full Council the five proposed changes (1, 2, 4, 5 & 6) to the Constitution as set out above to avoid the identified potential issues that could arise from not doing so.

4.2 It is also recommended that the proposed arrangements be introduced for an initial period of 12 months so that the impact can be reviewed and analysed. If the anticipated benefits are found to result in improved, consistent decision making acceptable to all parties engaged in the process, consideration can be given to continuing the arrangements beyond the trial period.
5. CONSULTATION RESULTS AND PREVIOUS COMMITTEE FEEDBACK

5.1 The proposed changes were either proposed by the Portfolio Holder or have been discussed with him, the Leader and the Director of Planning and Development. The recommendations as proposed reflect the discussions held.

5.2 The proposals as originally drafted have been circulated to all Members and the comments received are summarised in the notes from the CRWP held on 19 February and at which all the proposed changes were challenged and discussed. This report follows the recommendations made at that meeting. The draft minutes form the meeting are attached as Appendix C.

6. NEXT STEPS: COMMUNICATION AND IMPLEMENTATION OF THE DECISION

6.1 The recommendations in this report, if agreed, will be progressed as set out in the Timetable on the front sheet.

6.2 If agreed by Full Council on 20 April 2016, the approved changes to the Constitution will be made.

7. CROSS-CUTTING ISSUES AND IMPLICATIONS

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<thead>
<tr>
<th>Issue</th>
<th>Implications</th>
<th>Sign-off (name of officer and date)</th>
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<tbody>
<tr>
<td>Legal including Human Rights Act</td>
<td>The Council is required by the Local Government Act 2000 to have a constitution that is up to date and fit for purpose. The Council also has a statutory duty to secure continuous improvement in the way in which its functions are exercised having regard to a combination of economy, efficiency and effectiveness. Review of the Constitution demonstrates compliance with the requirements and duties.</td>
<td>Keith E Trowell Principal Lawyer and Deputy Monitoring Officer 09/03/16</td>
</tr>
<tr>
<td>Finance and other resources</td>
<td>There are no new financial implications.</td>
<td>Lee Colyer Director of Finance and Corporate Services (s151 Officer) 15/03/16</td>
</tr>
<tr>
<td>Equalities</td>
<td>Decision-makers are reminded of the requirement under the Public Sector Equality Duty (s149 of the Equality Act 2010) to have due regard to (i)</td>
<td>Sarah Lavallie West Kent</td>
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eliminate unlawful discrimination, harassment, victimisation and other conduct prohibited by the Act, (ii) advance equality of opportunity between people from different groups, and (iii) foster good relations between people from different groups. The decisions recommended through this paper have remote or low relevance to the substance of the Equality Act. However, it should be noted that the recommendations in this paper do not alter the need to consider the requirements of the Public Sector Equality Duty within individual planning decisions.

8. REPORT APPENDICES

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

- Appendix A: [Extract from part 3 of the Constitution (November 2015) - showing proposals as tracked changes]
- Appendix B: [Extract from part 3 of the Constitution (November 2015) – clean version]
- Appendix C: [Notes of Constitutional Review Working Party meeting held on Friday 19 February 2016]

9. BACKGROUND PAPERS

- The Tunbridge Wells Borough Council Constitution - December 2013 (as amended November 2015)
- Constitutional Review Working Party 19 February 2016 - Agenda Item 3: Proposed Changes to the Constitution
- Notes of Constitutional Review Working Party meeting held on Friday 19 February 2016