

# TRIANGLE RESIDENTS' GROUP



## *Responses submitted to Elmbridge Borough Council's consultation on Community Involvement*

### *Q1 Do you agree with the proposal to stop publishing representation letters for planning applications on the Council's website?*

No. The main justifications put forward in the paper from officials to the Planning Committee in September 2022 were that any comments (not simply in the form of 'letters') require redaction and checking to ensure compliance with legislative requirements and that the level of resources required to ensure that compliance is unsustainable are unconvincing and lack a sound evidence base. Several serious concerns are detailed below.

#### **Transparency**

1. *Weakening transparency:* The proposal represents a significant backwards step by making any objections only accessible to officers and Councillors and effectively denying residents the access that they have been allowed hitherto. The current publication arrangements have been in place for several years and have made an important contribution towards building confidence in the openness of the planning system in the wider community. People are able to see and weigh, almost in real time, the arguments being put forward, decide how far they agree with them and submit their own views in support or against. What is now proposed is a severe curtailment of wider public access and, for practical reasons set out more fully below, of convenient access for elected representatives. The current balance in consideration of planning proposals will tilt even further towards officials and developers.

2. *Inconsistency:* The approach is inconsistent with wider Government policy on planning. In his statement on the Levelling Up Bill on 6 December 2022, the Secretary of State stated his aim to "give local communities a greater say in what is built in their neighbourhood." Limiting the current access to views coming from the community is inconsistent with this approach and

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with the aim expressed in the EBC document of providing opportunities for local residents and other interested parties to become involved in planning.

## **Accountability**

3. *Weakening accountability:* The role of both officials and elected representatives is to use their skills, experience and powers on behalf of the community they serve. To ensure accountability to that community who depend on them it is vital to retain confidence through maintaining transparency and openness wherever possible. The facility to see who is commenting on applications, where they are located and what evidence and arguments are being presented provide an important means of validating planning decisions and recommendations and influencing them by clarifying facts or providing alternative views where necessary. It will also become much more difficult for residents to check easily how far the Officer Report has taken comments into account. A simple catch all statement that often occurs in these reports that comments have been taken into account is not enough to build public confidence in the fairness and balance of the planning system.

## **Potential legal threat**

4. The Consultation Document (CD) reflects the advice given by officials on 6 September 2022 that legal and statutory requirements, notably the Environmental Information Regulations (EIR) and the General Data Protection Regulation (GDPR) in effect required the new approach (CD paras 4.4.4-4.4.6). This requires careful scrutiny against current policy, an assessment of the actual risks of legal challenge and the precedents cited if creating a blanket freedom of information restriction on the release of public information is to be avoided.

5. *Current openness:* Published EBC guidance could not be clearer that individuals submitting objections should do so with an understanding both that some personal details would need to be disclosed, that they needed to be circumspect in the use of language and that comments should be restricted to defined topics. A list of excluded topics that would not be considered is also included. The following quotations from three separate paragraphs in online guidance are worth repeating at length:

“... any comments you make about a planning application will be published on our website, including your name and address.” [TRG underlining]

[ Because comments might be viewable] “It is therefore your sole responsibility to ensure you do not include any offensive, defamatory or discriminatory language in your comments as you could be held legally responsible for this in the future.”

“All comments received in relation to a planning application is public information and will therefore be available for public inspection. Your comments will also be published on our website and will include your name and address.” [TRG underlining]

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In view of these caveats, potential objectors should be in no doubt about the potential availability of their identifiers or the need to be circumspect in any comments that they might make that might lead to another individual.

6. *Absence of legal and financial proper risk assessment:* Given the current guidance provided for those wishing to comment, the actual risks of fines, presumably from the Information Commission, appears to be low. There is no indication that EBC has faced the risk of fines in the past in this area or actually had to pay any. There is no evidence of widespread challenges elsewhere in the country or under what specific circumstances any fines might have been levied, if at all. There is no definitive legal advice set out in material presented to the Council. It is therefore not clear why and on what basis such a fundamental change to well-established and tested procedures is required now.

7. *EIR and GDPR requirements:* The legislative requirements in this area are complex and need to be interpreted in specific individual cases. However, it would be perverse to use separate legislation designed to encourage openness and to protect the personal details from misuse to overturn well-established and accepted arrangements for disclosing representations on planning matters. The EIR have a general presumption in favour of disclosure and the GDPR require a judgement to be made as to whether the public interest in not disclosing outweighs the public interest in disclosure. It is arguable whether the EBC blanket proposal to withhold publication of material which it has been content to make available to date would satisfy these principles.

8. The only case presented to the Council to support such a radical change of approach relates to Torfaen County Borough Council (TCBC). The decision by the Information Commissioner on 11 February 2020 that TCBC was entitled to withhold information under regulation 13(1) of the Environmental Information Regulations 2004 (EIR) was particular to the circumstances of that specific case. It did not set an overarching precedent applicable in all planning circumstances and to all Councils. In particular:

- *Disclosure policy:* The Torfaen decision related to a request from an individual applicant to identify the personal details (namely the name and address) of the single objector. TCBC's established policy was not to disclose online any personal details such as names and addresses online and that disclosing summarised comments with generic information on the location of commentators was sufficient to reflect any public concerns or support. This approach is a world away from EBC's openness, and that of other Councils, in disclosing comments in full and identifying the objectors.
- *Legitimate expectation:* The Information Commissioner judged that in view of TCBC's clear policy of non-disclosure, an objector would have a legitimate expectation that personal details enabling them to be identified would not be published online. In contrast, the legitimate expectation of those submitting objections to EBC that the material, including name and address, would be published online. The individual chooses to whether or not to submit an application in these circumstances. No evidence

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has been produced to show that this approach has been an inhibiting factor on people's willingness to submit objections.

- *The public interest:* The EBC proposal to cease publishing comments from objectors runs counter to legitimate public interest. The Commissioner accepted that this could relate to broad general principles of accountability and transparency as well as case-specific interests. Those interests, especially in the case of planning applications, can include the impact of the proposal not only on immediate neighbours but also on other third parties. It is difficult to see how a fair balance can be struck between the interests of applicants and objectors if the latter are denied the opportunity to see what issues are being raised to contribute evidence or arguments for or against that might need to be considered and ultimately to assess whether the weighting applied by officials properly reflects the issues they have raised.

9. *Access under FOI and EIR:* It is of course possible to request access to comments under the Freedom of Information Act and EIR. In view of the timescales this would only be possible after the actual decision. That would require a redaction process and access could still be blocked by officials using exemptions available under the legislation. It would also be a serious inconvenience for those contemplating Third Party Representations who would presumably be forced to attend the Council Offices and again face timetable pressures to get their representation in on time.

## **Practical implications**

10. The proposal should not be viewed in isolation from the overall processes described in the document. It continues the progressive weakening of the scope for public engagement introduced by the last set of changes. There is no real evaluation of how effective those changes have been in practice and how they have benefitted residents.

11. The CD reinforces a growing impression that in practical terms residents, their elected representatives and residents' associations (still counted as one household in CD para 4.6.4) come a poor third to officials and developers in the planning process. The scope for public engagement is more apparent than real. In particular:

- *Public access to comments on applications:* Comments from the public will be held on file accessible to Councillors and officials but not in real time by the public (CD para 4.4.3). The document acknowledges that these comments will be a matter of public record and not confidential but would need to be redacted when viewed (CD 4.4.4-4.4.5). The reality is that the perceived need for redaction, the 21-day normal timeframe for comments (CD para 4.4.1) and the fact that objections will be spread throughout the period would mean that individuals (often more than one) and other third parties with a legitimate interest in the application would (presumably) have to visit Council Offices on several occasions to keep track of what issues are emerging.

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- *Residents' Associations:* The new approach is not clear whether submissions from residents' associations will be left off the website. It is quite clear that they will only count as one 'vote' in any tallying exercise (see below). They do, however, provide a collective voice reflecting area concerns and often provide detailed argument and evidence to act as a counterweight to the case made by developers.
- *Resource implications:* The original report presented to the Planning Committee stressed the pressures on official resources. However, it failed to quantify any savings arising from the new regime, nor did it indicate how non-publication of objections will lead to a qualitative improvement in decision making. It is conceivable that resource pressures might actually grow. What would be the implications of dealing with more visits to Council offices to read presumably redacted submissions? Will EBC produce summaries online during the consultation period as appears to be the case with TCBC or will they simply lie on file?
- *The numbers game:* A tally of numbers of comments received will be published (4.4.3) but it is not clear whether this would be a running tally or a final tally. This is important, particularly with smaller applications where the rule of 15 applies (CD para 4.6.3). The decision on what is included in the tally and what is left out will be made by officials leaving interested parties unable to reach a view on the validity of those decisions. It also leaves open the question how easy it will be to ramp up the tally with a series of very short objections.
- *Increasing pressure on Councillors:* Lack of access by the public to comments submitted will inevitably lead to more pressure on Councillors who can access comments to clarify the arguments and to elevate applications to Committee level.
- *Multiple applications:* Developers often bombard the Council with a series of applications over time. This is of course legitimate but can also be seen as attempts to wear down local opposition and whittle down the number of objections/objectors. Without ready access to information on previous concerns derived from earlier comments, it will not be possible to readily identify what issues have been addressed and whether previous substantial objections have been dropped.
- *Delegation to officials:* Planning officials already have extensive delegated powers over decision making (CD paras 4.6.1-4.6.2). Reducing access to relevant information contained in comments received threatens to make the handling of planning applications even more of a closed process between officials and developers, compounding public suspicions of the fairness of the process, deserved or not.
- *Public speaking:* The basic rules on public speaking remain unchanged (CD paras 4.6.5-4.6.9). Potential speakers will be unable, in the absence of online comments, to assess who might wish to speak, who might be best placed to speak to reflect a range of views and what range of issues have been included in comments. There is also no provision for interested parties to be alerted to any committee reference and the date of the Committee.

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*Q2 Hard copies of Local Plan consultation documents will no longer be delivered to all public libraries. Library users will need to use the library computers to view the documents online. Do you agree?*

No.

It is not clear in the absence of any published cost benefit analysis what this restriction is meant to achieve. Our aim in the interests of accountability and transparency should be to widen not restrict opportunities to access planning documentation. Removal of the opportunity to view written documentation will potentially marginalise many individuals particularly, though not exclusively, older members of the community, those uncomfortable with using the technology, those with sight problems more at ease with handling the printed page than having to depend on screens. Even people comfortable with and used to computers will often prefer to leaf backwards and forwards through a large document.