

Bias and Predetermination

A Guidance Note for Members

Introduction

- 1) Local Authorities are legal entities that are required to make decisions in accordance with the law and in accordance with their own governance arrangements as set out in a Constitution and a Code of Conduct. Each Principal Authority must appoint a Monitoring Officer who has responsibility to ensure lawful decision making. The Monitoring Officer is required to report to the Authority where the actions of the Council itself, its Committees or Sub-Committees, Councillors or employees give rise or is likely to give rise to a breach of any legal enactment or maladministration (Section 5 of the Local Government and Housing Act 1989).

Lawful Decision Making

- 2) There are certain procedural requirements in relation to the membership and operation of decision making meetings and legal requirements as to the provision of sufficient information to enable informed decisions to be made. There can also be legal requirements to undertake consultation before decisions are made. Where consultation is required (or whenever it is undertaken) it must be done properly and the results taken into account by the decision maker, before a final decision is made.
- 3) It is essential that the public have confidence in the procedures adopted and that Members themselves ensure that decisions are properly taken in accordance with legal requirements.
- 4) Legal challenges are common, particularly on controversial matters, and the limits of judicial review mean that whilst claimants will often be aggrieved with the merits of a decision it is more often the case that challenges are brought on the basis of alleged defects in the decision making process.
- 5) The key components to lawful decision making are that Members do not close their minds to permissible outcomes, consider issues in good faith without the presence or appearance of bias, have regard to all relevant considerations and act in accordance with the law.

What is Predetermination or Bias?

- 6) Predetermination is where a Councillor's mind is closed to the merits of any other arguments about a particular issue on which they are making a decision and that they have already made their minds up about it. The Councillor makes a decision on the issue without taking all relevant information into account.

- 7) Predetermination is therefore the surrender by the decision-maker of his/her judgement by having an evidentially closed-mind such that they are unable to apply their judgement fully and properly to an issue requiring decision.
- 8) It is essential that Councillors do not appear to have already made up their minds in advance of the meeting itself. Such impressions can be created in a number of different ways such as quotes given in the Press or what is said at the meeting itself or at other meetings and in correspondence (particularly, nowadays, in e mails) Predetermination may amount to a form of bias.
- 9) Bias can also occur where the private interests of a Councillor impact or may be perceived to impact on their decision making. For example, where the Councillor's relationship with any person or body/agency who may be affected by the decision may reasonably be perceived to affect, their ability to weigh matters fairly and properly. Bias is conduct that, to a fair-minded and informed observer, gives rise to a real possibility that a member is biased in the sense of approaching a decision with a closed mind and without impartial consideration of all the issues. Bias is technically of two sorts: actual bias and apparent bias. The latter is easier to allege and establish. The test is whether a reasonable, informed observer would take the view that there was a possibility of bias¹. If a Member participated in a decision despite having a pecuniary interest then that would be actual bias. Giving the appearance of having a closed mind on an issue may lead to an allegation of apparent bias.
- 10) In instances of both predetermination and bias, the implication is that a decision will be taken in a particular and fixed way irrespective of the merits or the information provided at the meeting.

Consequences

- 11) Where a Councillor has a closed mind, this potentially has a direct impact on the validity of the decision and might make the decision challengeable either by way of Judicial Review or some other legal appeal process. If proven it would amount to a procedural irregularity and might mean that the decision taken by the Committee is then regarded as unlawful and void.
- 12) Challenges can also be made via a complaint to the Local Government Ombudsman who can investigate the matter and has power both to secure documentation held by the council and to require witnesses to attend for interview. A finding of maladministration requires the Council to place a public notice of the findings, debate at full Council and respond to the findings.
- 13) The Monitoring Officer also has the power to investigate a matter and decide if there has been any procedural irregularity as well as a possible breach of the member's code of conduct.

Predisposition

¹ R (on the application of Ortona) v SSCLG 2009 JPL 1033. See *Georghiou v LB Enfield* (2004) EW HC 779.

- 14) Predisposition means that a person has not yet fully made up their mind about an issue. Although they may have policy, personal or other legitimate reasons to be disposed toward a particular outcome, predisposition still holds open the possibility that the member will have regard to all of the evidence provided to him or her and is still open to persuasion on the facts of the case.
- 15) The law recognises that a Councillor may be predisposed to a particular view on issues but this in itself is not a bar from them taking a full part in the decision making. Provided they have an open mind to the merits of the arguments before they make a final decision on the specific issue before them e.g. a general antipathy to wind farms does not preclude a specific decision about a specific application for a wind turbine planning application in a specific locality. The general view does not close the member's mind to the relevant facts concerning the specific decision that needs to be taken.
- 16) By the nature of the councillor role, elected members will have predispositions on matters of policy, or perhaps on a local issue for which they have campaigned or stood for election. The holding and expression of views, even strong views, is to be expected. The common law recognises this and has established that only if a councillor firmly closes his/her mind to any other possibility (when called upon to take or participate in a decision) will the courts judge the matter as having strayed into predetermination or bias.
- 17) The law recognises that Councillors do have opinions and views on a wide range of issues and whilst not having a closed mind, nevertheless, they are not expected to have an empty mind!**

Localism Act 2011

- 18) In order to make it explicitly clear that all Councillors should be entitled to speak on behalf of their communities without necessarily precluding themselves from local decision making, Section 25 of the Localism Act 2011 was implemented to address this issue. In effect, expressions of a view on a particular local planning issue, or campaigning for election on a particular platform, should not of itself be treated as evidence of a closed mind on a particular matter which would prevent them from participating in Council business relating to that issue.
- 19) Section 25 states that if there is an issue about the validity of a decision as a result of an allegation of bias or predetermination (either actual or apparent) then in those circumstances a decision maker is not to be taken to have had or to appear to have had a closed mind just because he or she has previously done anything that directly or indirectly indicated what view they might take or would take in relation to the matter.
- 20) The clear intention of the legislation is to allow Members to feel more confident in becoming involved in local debate without fear of precluding themselves from taking part in decision making.
- 21) This is based on the principle that a member should be deemed to be open to persuasion on the facts of the case before the actual decision is taken at the

Committee, having taken into account the relevant Committee reports, the debate, advice provided, consultation undertaken and any representations made at the meeting i.e. taking into account all of this information and only then making a decision.

- 22) However, this Section does not provide blanket protection or immunity for anything that is said by a Member. The test of what an 'impartial and fair minded observer would think'² would still apply in relation to interests or relationships, which bring into question issues of undue influence or bias. The protection of Section 25 only relates to previous statements not being **in of themselves** proving predetermination or bias. If there is other evidence available to demonstrate predetermination or bias then such statements might then become admissible.

Freedom of Speech

- 23) There is an important difference between those Councillors who are directly involved in making a decision and those Councillors who are legitimately seeking to influence that decision. Councillors who are not involved in making a decision are generally free to speak how they want with regards to a matter and indeed frequently take on the role of advocate for the local community. This can include attending a decision making Committee as a non-Committee member and, with the leave of the Chairman addressing the Committee on the merits of the matter before it.

Case Law

- 24) The Localism Act effectively confirms and re-states the established case law in relation to predetermination and it is therefore helpful to consider such cases as they provide practical examples of instances where predetermination was not proven.

R (Lewis) v Redcar and Cleveland Borough Council [2010] UKSC11

- 25) A highly controversial decision taken just before an election was unsuccessfully challenged. Members were entitled to be predisposed to determine an application in accordance with their own political views and policies, provided that they listened to the arguments and had regard to all material considerations. Neither the proximity of the local election nor the unanimity of the members of the majority group in themselves were capable of demonstrating that those who voted in favour of the application had closed minds to the planning merits of the proposal.

R (Island Farm Development Limited) v Bridgend CBC 2006 EWHC 2189

- 26) This case involved a refusal by a Local Authority to sell land to the claimant who wished to develop it. There were strong local feelings about the matter and indeed several members of the Council had been elected having campaigned

² Porter v Magill 2001 VKHL 67

against the sale. The Judge held that Members were entitled, when making decisions on local issues, to take into account policies they believe in, especially if they have been part of a manifesto in a local election. Prior statements were simply evidence of predisposition, not of closed minds.

Condron v National Assembly for Wales [2006] EWCA Civ 1573

27) In the case of Condron, a Member as he walked into the building just prior to the meeting, was asked how he was going to vote and stated that he was “going with the Officer recommendation”. Even in this instance, where there was explicit evidence of intention, nonetheless, the Courts ruled that there was no evidence that at the meeting itself the Member had a closed mind as there was no evidence to suggest that he wouldn’t have changed his mind as there was still the possibility that he might have changed his opinion depending on what he had heard.

Conclusion

28) The legislation is clear that whatever a Councillor says or does prior to the meeting cannot by itself, be used as evidence of predetermination or bias provided they conduct themselves appropriately and consider and weigh the matters at the meeting itself before reaching a decision.

29) Nonetheless, separate from the legal protection, Councillors also need to guard against the perception or unfounded allegations of predetermination and bias. Therefore, it is important for Councillors to explain that their views are preliminary and are not to be taken as their final decision and that they have retained an open mind and will listen to both sides of the argument before reaching a final conclusion.

Gifts and Hospitality

30) Councillors are no longer legally required to register gifts and hospitality. The key concern that may arise is that the acceptance of gifts and hospitality might give rise to a perception of actual or apparent bias.

31) Members should always approach decision-making with an open mind. There may be instances where offers and acceptances of gifts and/or hospitality may give the impression of real or actual bias. For example, if they are particularly lavish, frequent or timed to coincide with decision-making or from a company or community group which stands to be affected by the decision to be taken.

32) Consequently, members should always view offers of gifts and hospitality cautiously and particularly so if there is any association between the originator and any decision which a councillor will or may take. Remember, the *appearance* of bias - to a ‘fair minded and informed observer’ (i.e. the courts) - is sufficient to potentially undermine an authority’s decision-making process.

33) Gifts and hospitality should never be sought or solicited; and where offered they should generally be declined; and certainly so if they relate to potential decision-

making, either at a specified or potential future time. This would protect the councillor, and the council, from allegations of bias and influence and would maintain the integrity of democratic decision-making.

- 34) It remains open to councillors voluntarily to register offers/acceptances of gifts as non-pecuniary interests should they wish to do so. The register of interests form contains a section where members can record any non-pecuniary interests in addition to the statutory disclosable pecuniary interests which they are required to record. Members are strongly advised to register such interests to demonstrate openness and transparency.

Bribery

Act

- 35) It is a criminal offence under the Bribery Act 2010 to request or receive money or other advantage in return for improperly doing or not doing an act as part of your Councillor role. Voluntary registration of gifts and hospitality received or offered protects both you and the Council from such allegations of corruption. The declaration form has a section which can be used for these voluntary disclosures of interest.

Membership of Organisations

- 36) Councillors and co-opted members will often be members of outside organisations, locally or nationally, either in their private capacity or as appointed by their councils. This can include community groups, lobby groups, political parties and trade unions.
- 37) An association with such a group could, conceivably, be a factor in any allegation of real or actual bias. This would depend on the circumstances of the case. Mere membership is unlikely to be an issue. However, active involvement in the promotion of a particular cause or object, if this is germane to a decision before the council, may well give rise to an appearance of bias.
- 38) In order to strengthen openness and transparency it is advisable for Members to register such membership in order to protect themselves and the Council from allegations of bias or of having a particular hidden agenda.
- 39) It is always open to members voluntarily to declare any other personal interests in that section of the Register of Interests Form provided for this purpose. If a member considers that a personal interest, other than a disclosable pecuniary interest, would conflict with their responsibilities to abide by the Seven Principles of Public Life (the 'Nolan Principles') then these can be included in that latter section of the form.
- 40) One of the Nolan Principles is that:

"Holders of public office must avoid placing themselves under any obligation to people or organisations that may try inappropriately to influence them in their work"

- 41) Therefore, members need to be mindful of any pronouncements they may make as part of such organisations, either on their behalf or individually.

Trade Union Representation

- 42) Insofar as any such association may involve sponsorship (by that organisation) e.g. by a Trade Union then registration is already required as a Disclosable Pecuniary Interest. The relevant Regulations explicitly provide that sponsorship includes “any payment or financial benefit from a trade union within the meaning of the Trade Union and Labour Relations (Consolidation) Act 1992”. This means that sponsorship by a trade union will be a disclosable pecuniary interest and should be registered as such.

Dual/Triple Hatted Members

- 43) Dual and triple-hatted members need to balance their legitimate right to express views while protecting the integrity of council decision making from allegations of real or apparent bias and predetermination arising from potential conflicts of interest between the two Councils he or she represents.**

- 44) Members of more than one local authority may occasionally find themselves in a position where they have made a decision or been consulted on a matter in one authority which then comes up for consideration in another authority. In those circumstances, advice should be sought from the Monitoring Officer as to whether or not the initial involvement precludes them from taking part in the decision making.

- 45) Members may also need to be cautious as to whether they can take part in a decision that has financial implications, either positive or negative, for the other public body. Again the advice of the Monitoring Officer should be sought.

Community meetings

- 46) Where a member agrees to chair a community or public meeting on a particular planning matter, the member should make it clear at the outset the capacity in which they are acting (e.g. as a facilitator to local discussion) and make a very clear statement setting out that they are taking part with an open mind. It is suggested that members' might want to use the following words to do this (varied to name the particular meeting) and perhaps to include a copy as an annex to the minutes:

I have agreed to chair this meeting [Liaison Committee etc] in order to enable meetings to take place between [local residents, the Parish Council, the operator, the landowner, the District Council through its officers, and other interested parties]. I intend to listen to the views and opinions put forward by all parties at this meeting but I would like to make it clear that insofar as there is any discussion or consideration of a proposal by any party that may require planning permission, all parties should be aware that notwithstanding anything I may hear or any comment I may make at these [Liaison] meetings, this is not

the correct forum to determine any such matters and that I will make my decision on such matters at the relevant Council meeting with an open mind and based on all the evidence presented at that meeting.

47) A version of this statement could also be made if a member is participating in, but not chairing, such a meeting, for the avoidance of doubt.

Code of Conduct

48) Members will be familiar with their responsibilities under the Code of Conduct to register and declare disclosable pecuniary interests and any other non-pecuniary interests which they wish to register. These provisions protect council decision-making, and members themselves, where private interests may otherwise conflict with public duties.

49) If you are a member of a planning committee you will also need to have regard to the specific guidance in the Council's Planning Code in relation to bias and predetermination.

Summary of Do's and Don'ts

50) The law of ***bias and predetermination*** protects the democratic decision making process such that decisions are taken properly and conscientiously, having due regard to advice and other material in the meeting, and what it said in the relevant debate.

Do's

- Members should not be afraid of holding or expressing views, even strong views - provided that they remain just that - ***views***
- Be careful not to convey the impression in the mind of a reasonable person (and before the decision in question) that you have already made up your mind 'come what may'
- Remember that the *appearance* of bias is sufficient to undermine the decision-making process even if you believe that no bias *actually* exists

Don'ts

- In expressing your views ahead of a decision, don't use extreme language that could indicate you've ***predetermined*** the matter already
- Allow your associations and memberships to create the *impression* of bias
- Accept gifts and/or hospitality that creates the impression of bias or corruption

51) For further advice about this guidance, and to discuss any particular scenarios, contact the Monitoring Officer on 0300 0030107 or kevin.lane@cherwellandsouthnorthants.gov.uk.