



## SOUTH CAMBRIDGESHIRE DISTRICT COUNCIL

### LEGAL OFFICE ADVICE NOTE



#### PRE-DETERMINATION AND BIAS

**As a Councillor you may become involved in matters which are controversial or which generate a large amount of interest in your local community. The two key areas where this is likely to occur are Planning and Licensing applications, although all councillors need to be aware of potential pitfalls in involving yourselves in the development of your own community. This advice note aims to guide you through the legal minefield that is “Pre-determination and Bias” so that the decisions you make can stand up to challenge.**

#### PRE-DETERMINATION

The Nolan Committee’s third report on Standards in Public Life highlighted the problem as follows: *“Local democracy depends on councillors being available to people who want to speak to them...it is essential for the proper operation of the planning system that local concerns are adequately ventilated. The most effective and suitable way this can be done is via the locally elected representative.”* However it goes on to say: *“Such lobbying can, unless care and common sense are exercised by all parties concerned, lead to the impartiality and integrity of a councillor being called into question.”*

The rules against pre-determination flow from the right to a fair and unbiased hearing (particularly in the light of the Human Rights Act 1998) which is a general legal requirement, which applies **in addition** to the Code of Conduct for Members. The law emphasises that the public are entitled to expect the highest standards of conduct and probity by all persons holding public office and this includes ensuring that the decision-making processes in which you participate are above reproach.

If before a council or committee meeting you are seen to have “made your mind up” by either stating your support for a particular outcome for an application or by participating in lobbying you will have “fettered your discretion” or “pre-determined” the matter.

If this has happened you should play no part in any decision on the application and must not participate in any way or vote at a committee or council meeting (even if to do so would not be a breach of any requirement of the Code of Conduct for Members).

To avoid allegations of pre-determination you must always keep an open mind on an issue and be prepared to have any initial opinion changed once you have heard all the facts and opposing arguments at a meeting.

In practice this means you can do the following:

- Meet interested parties and listen to their view but explain that you are keeping an open mind until you have heard all the arguments, including those put forward at the meeting at which the decision will be made. Under no circumstances should you represent an interested party if you are sitting on the decision-making body.
- If you are also a parish councillor and have participated in a parish council decision on a matter that has now come before you in your role as a parish councillor you should make a statement at the start of discussion on the matter on the lines of: "I am a member of the parish council which has made a recommendation to the district council on this matter and want to make it clear that I am looking at the matter afresh today with an open mind."
- Ensure that you do not say or do anything that would make it appear that you have decided how to vote prior to the meeting. Be careful of expressing any personal opinion on the issue in question
- Take an officer with you when you go to listen to the views of other people if you are concerned that it might be alleged you have fettered your discretion by having such discussions
- Get involved in a campaign for or against a particular application but realise that this will mean you cannot participate in the decision-making or pressurise other councillors to support your view-point

You should not give instructions to an Officer or place pressure on an Officer in order to secure a particular recommendation on an application.

### **Site Visits**

If you are a member of Planning or Licensing Committee it is essential that you read and follow the guidance on Site Visits contained in the separate Code of Conduct for Planning and Licensing Committees. Please remember that you should not discuss the merits or otherwise of the application with other members or with any other party on the visit. On-site discussions should relate solely to the purpose of the inspection.

### **Pre-determination v Pre-disposition**

The law does distinguish between a legitimate predisposition arising from prior consideration of the issues and an unlawful predetermination.

Predisposition is consistent with "a preparedness to consider and weigh relevant factors in reaching the final decision" whilst predetermination "involves a mind that is closed to the consideration and weighing of relevant factors".

The decision-making structure, the nature of the functions and the democratic political accountability of Councillors do permit a legitimate potential for predisposition towards a particular decision.

## **BIAS**

Bias has been defined as "an attitude of mind which prevents the decision-maker from making an objective determination of the issues that he has to resolve." What you need to be aware of is that there is no need for proof of actual or potential bias to show "procedural impropriety" – an appearance of bias is sufficient. The legal test for bias is "**whether a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility of bias.**"

Bias also includes a situation where it is felt that a decision-maker has pre-determined the case upon his/her own prejudices. For example where a member of the public is given the impression, beyond the suggestion of a mere pre-disposition, that a member or authority will approach the matter with a closed mind and without impartial consideration of all the issues.

Where the decision-making body is quasi-judicial (such as Licensing Panels) it is even more important for you to consider the issue carefully. To help avoid accusations of pre-determination or bias and to ensure that ward councillors are free to represent their constituents as "interested parties" it is the council's policy that ward councillors do not sit on Licensing Panels where the Panel is considering an application in that member's ward.

## **Relationship to the Code of Conduct**

Bias at common law (ie. law which has evolved as a result of custom and judicial decisions as distinct from that which is laid down by Parliament) and the rules regarding personal and prejudicial interests in the Code of Conduct are related but you must consider each separately.

The test for common law bias has a lower threshold. For example, if you are a Licensing Panel member and you say or do something which creates a real danger of a perception that you are unable to make an impartial determination of the issues (ie. "fettering your discretion") you may face an allegation of bias. Under the Code of Conduct, you need only concern yourself with the definition of personal interest under the Code and if you have such an interest to then consider if that personal interest is prejudicial. If your interest does not constitute a personal interest, that is the end of the matter under the Code of Conduct.

Standards for England (SfE) advise that members also need to take the 10 General Principles that underpin the Code of Conduct into account when making decisions as well as the Code itself. The SfE advises that: “You should not reach a final conclusion before you come to take a decision on an issue” and that “Your statements and activities should not create the impression your views on a matter are fixed, and that you will not fairly consider the evidence or arguments presented to you when you are making a decision.”

**Further advice:**

This area of law can be quite complex as it is based on case law and interpretation of judgements. If you are unsure about the contents of this guidance note or need further advice on a particular issue please contact the Legal Office for further guidance.

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