

**From:** David Kitson <<mailto:David.Kitson@scarborough.gov.uk>>  
**Date:** 4 January 2017 at 17:16:53 GMT  
**To:** All Councillors  
**Subject:** Refresher on Conflicts of Interest and PredeterminationDear Cllrs

As the New Year gets underway, I felt it would be useful to remind all Members about conflicts of interest, predetermination and bias.

Failure to act in accordance with the law can result in decisions being subject to legal challenge, as well as potential criminal offences and civil court claims. It is therefore important to get things right to protect not just the Council, but yourselves as individuals making decisions in the public interest.

This email is meant as a brief overview. Should you require legal advice then please contact myself or Lisa Dixon.

### Conflicts of Interest

There are 2 types of interest relevant to Members:

- (a) Disclosable Pecuniary Interests (DPI) – set out in legislation (see [http://www.legislation.gov.uk/ukxi/2012/1464/pdfs/ukxi\\_20121464\\_en.pdf](http://www.legislation.gov.uk/ukxi/2012/1464/pdfs/ukxi_20121464_en.pdf))

Where an item of business being considered for determination by the Council, any Committee you are part of, or by you as an individual Member relates to or affects any of your DPIs, then you cannot take part in the discussion of that item or vote upon the same unless you have been granted a dispensation. You must also withdraw from the Meeting at which the item is being considered for the duration of that item.

Failure to comply with this is a criminal offence under the Localism Act 2011, as well as being a breach of the Code of Conduct.

For example, should you own or have any other beneficial interest in land or properties within the Borough (you may have a tenancy or lease etc.) you will have registered this as a DPI. If a matter for determination before Council concerns the sale or lease of property or land bordering the property or land in which you have an interest, then the matter is highly likely to relate to or affect that property or land.

- (b) Other Interests – set out in Part D of the Council's Code of Conduct (see <http://democracy.scarborough.gov.uk/documents/s71066/5.1%20-%20Members%20Code%20of%20Conduct.pdf>)

These are known as 'personal interests' and 'personal prejudicial interests'. Full information about what may constitute a personal interest is set out in the Code of Conduct accessible via the above link. Where you have a personal interest in an item of business to be determined by the Council, this does not stop you taking part in the discussion and vote upon the item, however you must declare that interest. If the personal interest is also 'prejudicial' (a prejudicial interest is where the interest is one which a member of the public with knowledge of the relevant facts would reasonably regard as so significant that it is likely to prejudice your judgment of the public interest), then you would not be able to take part in the debate/vote and would have to leave the room (unless of course you requested and received a dispensation).

## Predetermination and Bias

The rules on predetermination were developed by the Courts to ensure that Cllrs participate in meetings with an open mind. The Government sought to clarify the rules about predetermination by enacting section 25 of the Localism Act 2011. This was due to a concern that the rules were being interpreted in an overly strict way, reducing the quality of debate and stifling local discussion.

In a nutshell, Cllrs must not have a closed mind on an issue (predetermination), however a Cllr can have a 'predisposition' in favour of a certain outcome.

Cllrs are not expected to make decisions with empty minds. The law recognises that Cllrs will have political opinions on matters of local controversy. The test for apparent predetermination is in fact very difficult to satisfy, and the following case law provides useful examples. It must be remembered however that where a Cllr has already made up their mind without taking into account all relevant material considerations, including arguments made in the debate at Committee, then they are predetermined because their view will not change (it has crystallised regardless).

The case of *Island Farm Development v Bridgend CBC* ([www.bailii.org/ew/cases/EWHC/Admin/2006/2189.html](http://www.bailii.org/ew/cases/EWHC/Admin/2006/2189.html)) concerned a refusal by the Council to sell land to Island Farm Development who wanted to develop the land. There was strong local opposition to the proposed development, and the sale of the land had been a manifesto issue for some of the Councillors elected. Other Cllrs had campaigned on the other side. The Judge was clear that Members are 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 *Lewis v Redcar and Cleveland BC* ([www.bailii.org/ew/cases/EWCA/Civ/2008/746.html](http://www.bailii.org/ew/cases/EWCA/Civ/2008/746.html)) a decision to grant permission was made during the period of purdah (pre-election period). All of the Members of the Committee who were part of the controlling coalition voted in favour. The decision was challenged on the basis that there had been apparent bias or predetermination on the part of the coalition Members. The Judge at first instance allowed the challenge and quashed the grant of planning permission. The developer appealed to the Court of Appeal who set the decision aside, reinstating the planning permission. In doing so, the Court stated that Members are elected to propose and to pursue policies, and were entitled to be predisposed to determine an application in accordance with their political views and policies, provided that they listened to the arguments and had regard to material considerations. The Court could infer a closed mind or the real risk that a mind was closed from the circumstances and the evidence. On the facts the evidence did not show that any of those who voted in favour had closed minds.

In connection with the matters at issue in *Lewis*, the Court of Appeal concluded that the following matters did not provide evidence of predetermination:

- The fact that a planning application was promoted by the Council on Council owned land.
- The Council's pecuniary interest in the grant of permission.
- The fact that Councillors on the planning committee had previously expressed support for the scheme.

- The fact that a member of the planning committee had previously been a member of the cabinet that had agreed to sign heads of terms with a developer and made forceful public statements in support of the project.
- The fact that the development was a party political issue or the fact that Councillors voted on party lines.
- The holding of the planning committee meeting during the pre-election purdah period.

In doing so the Court of Appeal made it clear that the test for apparent predetermination is difficult to satisfy.

HOWEVER – it is not the case that predetermination will never exist – where a Cllr has a closed mind, or where the evidence supports a finding of apparent bias and predetermination despite a Cllr claiming to have an open mind, a decision can be successfully challenged.

Councillors must ask themselves whether they have already determined a matter (their decision has crystallised and will not change), or whether they are instead predisposed to a certain outcome, but will not crystallise their decision until having taken into account all material considerations, and having listened to and considered all arguments and debate.

Kind regards and Happy New Year

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