

Predisposition, Predetermination or Bias, and the Code

Both predetermination and bias have proved to be difficult and controversial issues for many members and monitoring officers. Although they are judge-made, common law issues, and not part of the Code of Conduct, the Standards Board for England has agreed to publish this occasional paper to help clarify the issues.

Based on advice from leading treasury counsel Philip Sales QC, which can be found on our website, this paper aims to clarify the issues involved and includes examples of where members are predisposed, and so can take part in a debate and vote, and where they are predetermined and their participation in a decision would risk it being ruled as invalid.

Sir Anthony Holland
Chair, the Standards Board
for England

What is predisposition?

It is not a problem for councillors to be predisposed. Predisposition is where a councillor holds a view in favour of or against an issue, for example an application for planning permission, but they have an open mind to the merits of the argument before they make the final decision at the council meeting.

This includes having formed a preliminary view about how they will vote before they attend the meeting, and/or expressing that view publicly. They may even have been elected specifically because of their views on this particular issue.

What is predetermination or bias?

Predetermination or bias can lead to problems. It is where a councillor is closed to the merits of any arguments relating to a particular issue, such as an application for planning permission, and makes a decision on the issue without taking them into account.

Councillors must not even appear to have already decided how they will vote at the meeting, so that nothing will change their mind. This impression can be created in a number of different ways such as quotes given in the press, and what they have said at meetings or written in correspondence.

Rarely will membership of an organisation, such as a national charity, amount to predetermination or bias on its own unless it has a particular vested interest in the outcome of a specific decision that a councillor is involved in making.

Making the decision

There is an important difference between those councillors who are involved in making a decision and those councillors who are seeking to influence it. This is because councillors who are not involved with making a decision are generally free to speak about how they want that decision to go.

When considering whether there is an appearance of predetermination or bias, councillors who are responsible for making the decision should apply the following test: would a fair-minded and informed observer, having considered the facts, decide there is a real possibility that the councillor had predetermined the issue or was biased?

However, when applying this test, they should remember that it is legitimate for a councillor to be predisposed towards a particular outcome on the basis of their support of a general policy. This is as long as they are prepared to be open-minded and consider the arguments and points made about the specific issue under consideration.

How can predetermination or bias arise?

The following are some of the potential situations in which predetermination or bias could arise.

Connection with someone affected by a decision

This sort of bias particularly concerns administrative decision-making, where the authority must take a decision which involves balancing the interests of people with opposing views. It is based on the belief that the decision-making body cannot make an unbiased decision, or a decision which objectively looks impartial, if a councillor serving on it is closely connected with one of the parties involved.

example

a) A district councillor also belongs to a parish council that has complained about the conduct of an officer of the district council. As a result of the complaint the officer has been disciplined. The officer has appealed to a member panel and the councillor seeks to sit on the panel hearing the appeal. The councillor should not participate.

Contrast this with:

b) The complaint about the officer described above is made by the local office of a national charity of which the councillor is an **ordinary** member and has no involvement with the local office. The councillor should be able to participate in this situation **because the matter is not concerned with the promotion of the interests of the charity.**

Improper involvement of someone with an interest in the outcome

This sort of bias involves someone who has, or appears to have, inappropriate influence in the decision being made by someone else. It is inappropriate because they have a vested interest in the decision.

example

A local authority receives an application to modify the Definitive Map of public rights of way. A panel of members is given delegated authority to make the statutory Order. They have a private meeting with local representatives of a footpath organisation and other interest groups before deciding whether the Order should be made. However, they do not give the same opportunity to people with opposing interests.

Prior involvement

This sort of bias arises because someone is being asked to make a decision about an issue which they have previously been involved with. This may be a problem if the second decision is a formal appeal from the first decision, so that someone is hearing an appeal from their own decision. However, if it is just a case of the person in question being required to reconsider a matter in the light of new evidence or representations, it is unlikely to be unlawful for them to participate.

example

A councillor of a local highway authority who is also a member of a parish council that has been consulted about a road closure could take part in the discussion at both councils. The important thing is that the councillor must be prepared to reconsider the matter at county level in the light of the information and evidence presented there.

Commenting before a decision is made

Once a lobby group or advisory body has commented on a matter or application, it is likely that a councillor involved with that body will still be able to take part in making a decision about it. However, if the councillor has made comments which suggest that they have already made up their mind, they may not take part in the decision. If the councillor is merely seeking to lobby the meeting at which the decision is taking place, they are not prevented by the principles of predetermination or bias from doing so. There is no particular reason why the fact that councillors can do this, in the same way as the public, should lead to successful legal challenges.

example 1

A council appoints a barrister to hold a public inquiry into an application to register a village green. The barrister produces a report where he recommends that the application is rejected. A councillor attends a meeting in one of the affected wards and says publicly: "speaking for myself I am inclined to go along with the barrister's recommendation". He later participates in the council's decision to accept the barrister's recommendation. At the meeting the supporters of the application are given an opportunity to argue that the recommendation should not be accepted.

This is unlikely to give rise to a successful claim of predetermination or bias. The statement made by the councillor only suggests a predisposition to follow the recommendation of the barrister's report, and not that he has closed his mind to all possibilities. The subsequent conduct of the meeting, where supporters of the application could try and persuade councillors to disagree with the recommendation, would confirm this.

example 2

A developer has entered into negotiations to acquire some surplus local authority land for an incinerator. Planning permission for the incinerator has already been granted. Following local elections there is a change in the composition and political control of the council. After pressure from new members who have campaigned against the incinerator and a full debate, the council's executive decides to end the negotiations. This is on the grounds that the land is needed for housing and employment uses.

The council's decision is unlikely to be found to be biased, so long as the eventual decision was taken on proper grounds and after a full consideration of all the relevant issues.

Conclusion

Councillors are entitled to have and express their own views, as long as they are prepared to reconsider their position in the light of all the evidence and arguments. They must not give the impression that their mind is closed.

For more information on the issue of predetermination or bias, councillors should talk to their monitoring officers or their political group.

The opinion of Philip Sales QC can be found on our website at:
www.standardsboard.gov.uk/Publications/OccasionalPaper

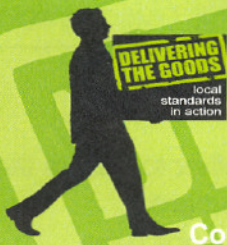
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Confidence in local democracy



The Standard



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Devolved framework a success, says MP

Sadiq Khan MP spoke yesterday of the importance of the conduct regime to local democracy.

Speaking on his eighth day as Parliamentary Under-Secretary of State at Communities and Local Government, Mr Khan said the devolution of the conduct regime has been a success.

He added that those involved have delivered the goods so far and

thanked delegates for their hard work.

The minister said that the public should have trust in their elected representatives and talked of the probity, accountability and objectivity expected of members.

He continued that the last 12 months have been among the most important since the conduct regime was established in 2001.

Mr Khan commented on the success of the revised Code of Conduct, which is clearer, simpler and more proportionate. He said it has bedded in well, but that it is now time to make revisions. Consultation on proposed amendments has now begun and comments are being invited before the closing date of 24 December.

The minister concluded by emphasising that the Standards Board is there to support local authorities

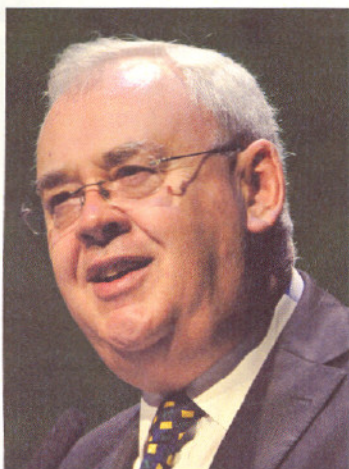
and that they should make the most of the organisation as a resource.



Sadiq Khan MP

Good progress under new framework

Dr Robert Chilton, recently appointed Chair of the Standards Board, believes that local authorities have made good progress in adopting the new local framework.



Dr Robert Chilton

Addressing delegates in yesterday's opening session, Dr Chilton said he is keen to hear from authorities themselves about their experience.

He spoke of a number of important issues that have already been competing for his attention. These include the relationship between local government and national politics. He also shared the Standards Board's experience of this year's party conferences.

In addition, the attention demanded by individual cases was discussed,

and he mentioned the issue of alternative action.

Glenys Stacey, Chief Executive of the Standards Board, also talked about alternative action in her opening speech, as one of a number of hot topics. She described it as an important tool, but one that needs to be used wisely.

Glenys revealed some of the latest figures for the second quarter of monitoring returns. These included more than 1,000 cases being reported so far. About half (54%) of complaints have been

made by members of the public. The final statistics will be on the Standards Board's website in November.

She referred to the Standards Board's corporate plan for 2009-11, which will reflect the organisation becoming an established strategic regulator. This will mean a continuing emphasis on guidance and support, and also developing proportionate ways of working with the authorities that are finding it difficult to maintain standards.

Closing governance gaps

The importance of ensuring local authorities employ good corporate governance arrangements within their committee structures will be discussed in a mini plenary this morning.

Joining the dots at 09.30 will allow delegates to examine case studies highlighting the

challenges faced by local authority standards, audit and overview and scrutiny committees.

The session will show how standards, audit, and overview and scrutiny committees together form an important part of governance arrangements within local authorities. It will explore their roles and responsibilities and will

outline common features and differences between the committees. The session will also show how the committees can work together to ensure that good governance is achieved.

Case studies will highlight the innovative ways that committees can work with

each other to ensure they close potential 'governance gaps'.

These include the example of Newport, where a review of its scrutiny arrangements led to them being relocated to a "Law & Standards" division.

Session information such as handouts and presentation slides will be available at www.annualassembly.co.uk.

Agenda: Tuesday

08.00 – 09.00 Refreshments

09.00 – 10.30 Breakout sessions

10.30 – 11.00 Refreshments

11.00 – 12.15 A higher level

12.15 – 13.30 Lunch

13.30 – 15.00 Breakout sessions

15.00 – 15.15 Comfort break

15.15 – 15.30 Delivering the goods

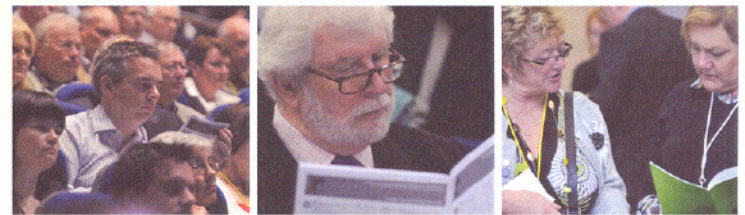
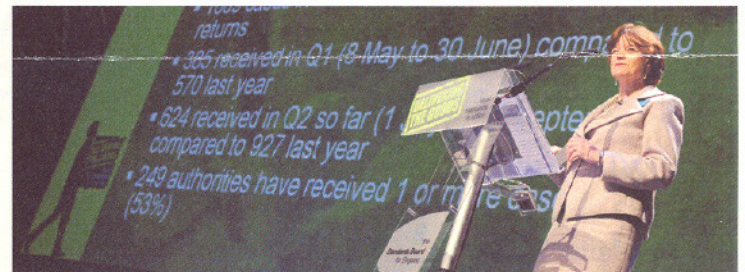
15.30 – 15.45 Local standards in action

15.45 – 16.15 Networking

16.15 Close of conference

Standards and Ethics

The Standards Board is supporting the 'Standards and Ethics' award at this year's Local Government Chronicle (LGC) Awards. Please visit www.lgcawards.co.uk for more details.



Please put any of your unwanted papers in the recycle bins situated around the conference centre. Thank you.

Eighth Annual Assembly

We will send all booking information to delegates attending this year's conference for next year's Annual Assembly as soon as it becomes available.

The Eighth Annual Assembly of Standards Committees will be again held at the ICC in Birmingham from 12-13 October 2009. We hope to see you again.

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See you again We hope you enjoyed the conference and look forward to seeing you at the 2009 Annual Assembly.



Planning ahead

The planning process		Scenario		Areas of the code that might be engaged
Gather evidence and analyse the issues		Borchester Land put forward 50 acres as a growth option for 5,000 houses and a Tescbury superstore to the Council	Matt Crawford (for Borchester Land) takes Cllr David Archer (Parish and District Councillor) out for a pint and a meal at Grey Gables to discuss the development	Paragraph 8: Personal interests
Develop a vision ('place shaping')	Jail			Paragraph 9: Declaration of interests Paragraph 10: Prejudicial interests Paragraph 6: Improper use of position Paragraph 3(2)(d): Not compromising impartiality of those who work for the authority
Generate options and alternative strategies	Jail			Paragraph 9: Declaration of interests Paragraph 10: Prejudicial interests Paragraph 6: Improper use of position Paragraph 3(2)(d): Not compromising impartiality of those who work for the authority Paragraph 4 (a): Disclosing confidential information
Evaluate options fairly	Jail	Core strategy working party meets to consider options (Cllr Archer is a member)		Paragraph 9: Declaration of interests Paragraph 10: Prejudicial interests Paragraph 6: Improper use of position
Select a preferred strategy	£ Jail	Council decides and consults on a preferred strategy - Grange Farm is included		Paragraph 9: Declaration of interests Paragraph 10: Prejudicial interests Paragraph 3(2)(d): Not compromising impartiality of those who work for the authority Paragraph 6: Improper use of position Possibly paragraph 4(a): Confidential information.
Consult on preferred option	Jail	Brian Aldridge (friend of Cllr David Archer) organises meeting at the Bull and frames development in very positive terms	Oliver Stirling (gentleman farmer) leads protest. Councillor Fletcher condemns the scheme	Paragraph 9: Declaration of interests Paragraph 10: Prejudicial interests Paragraph 6: Improper use of position Paragraph 5

The planning process	Scenario		Areas of the code that might be engaged	
Refine plan using responses to consultation	Jail	Core strategy working party meets to consider options (Cllr Archer is a member)	Paragraph 9: Declaration of interests Paragraph 10: Prejudicial interests Paragraph 6: Improper use of position	
Public hearing to check 'soundness' of plan				
Adopt plan incorporating inspectors recommendations	£	Full council meets to adopt the core strategy.(Cllrs Fletcher and Archer are present)	Paragraph 9: Declaration of interests Paragraph 10: Prejudicial interests Paragraph 6: Improper use of position	
Site brief / regeneration scheme/AAP/ Masterplan	Jail		Paragraph 6: Improper use of position Paragraph 3(2)(d): Not compromising impartiality of those who work for the authority	
Pre-application advice	£ Jail	Borchester Land and Tesbury make presentation to parish council and promise goodies. Meeting is invited to reach an agreement 'in principle' on what community benefits would be needed to support development	Paragraph 6: Improper use of position Paragraph 9: Declaration of interests Paragraph 10: Prejudicial interests	
Application submitted, validated and consultation		Borchester Land submit detailed planning application and section 106. Considered by planning officers	Paragraph 3(2)(d): Not compromising impartiality of those who work for the authority Paragraph 6: Improper use of position Paragraph 3 (2)(b): Bullying	
Recommendation reached	£ Jail		Paragraph 3(2)(d): Not compromising impartiality of those who work for the authority Paragraph 6: Improper use of position Para3(2)(b): Bullying	
Section 106 agreement	£			
Committee meet Decision issued	£ Jail	Councillor Archer suggests a committee site visit, at which he talks about the merits of the scheme	Planning committee meets (including Councillors Archer and Fletcher) and votes on the development	Paragraph 9: Declaration of interests Paragraph 10: Prejudicial interests
Pre-commencement approvals				
Development built				