

Case Law Update - Bias

Summary

1. This report draws Members' attention to a recent case where apparent bias on behalf of a Councillor led to a decision being overturned.

Background

2. For many years one of the most difficult areas of the law relating to local authority decision making related to predetermination and bias. A number of conflicting decisions by the Courts had left a great deal of uncertainty particularly on the issue of when a Member may be disqualified from decision making because of their previous actions or statements in relation to the matter under debate. Eventually, however, the case law moved to a relatively certain position and established that a Member could legitimately have a predisposition to a particular outcome, even a strong one, but could still participate in a decision so long as his or her mind was not totally closed to an alternative.
3. The Localism Act 2011 has largely codified the position the case law reached and says, in summary, that a decision-maker is not to be taken to have had, or to have appeared to have had, a closed mind just because he or she had previously done anything that indicated the view he or she would take in relation to the matter.
4. Without being able to rely on previous statements or actions it is difficult evidentially to establish that a Member has pre-determined a matter.
5. In 2014 the Chairman of Lichfield District Council's Planning Committee sent an e-mail to his fellow Conservative Councillors saying:

“Hello all, this is to remind group members who attended the last group meeting and inform those who did not, that the group decided in government parlance to have a three line whip in place at the council meeting on Tuesday. In plain terms group members either vote in favour of the report I will be giving regarding the local plan or abstain. Also if you are approached by anyone promoting alternative sites, please make no comment. If group members are reported making negative comments it would without any doubt derail our local plan. Sorry if you find this a little heavy handed but there is an awful lot at stake. Have a kind weekend. Kind regards, Ian.”

The Court decided that this was a strongly worded predisposition. There was no evidence that the debate itself was a sham and the indication of view expressed in the e-mail did not amount to predetermination.

6. The recent case of *Kelton v Wiltshire Council* is though a reminder that the law of bias is not dead in a local authority context. This was a challenge to a planning permission granted with a requirement for affordable housing. The developers had identified a local housing association to act as their partner in delivering the affordable housing. It was the only provider which had been willing to give assistance on the scheme, had expressed a clear interest in delivering it, had been named by the applicants as their potential partner, and had written in support and attended the planning committee meeting when it was considered.
7. The permission was passed by one vote. One of the members of the Planning Committee was a director of the housing association. He declared that he was a member of its board but, because it was only a prospective partner rather than the applicant for permission, he decided to vote on the planning application.
8. When the granting of planning permission was challenged the Court determined that the Councillor did not have a disclosable pecuniary interest which would have disqualified him. It was noted that the housing association was not the applicant and did not have a contract with the developer.
9. This part of the decision shows how difficult the law relating to disclosable pecuniary interests can be. The Councillor’s directorship was a disclosable pecuniary interest. The Localism Act says that if a Councillor: *“has a disclosable pecuniary interest in any*

matter to be considered, or being considered, at the meeting”, then he or she cannot participate in the decision. While the Councillor was not found to have breached the law on this occasion there was clearly a case to be argued that he did have a DPI in the business which would have resulted in him committing a criminal offence by voting.

10. The Court went on to consider the issue of apparent bias. The legal test for apparent bias is whether the fair-minded and informed observer, having regard to all material facts, would conclude that there was a real possibility of bias. It was plainly in the association's interests, and those of the Councillor director, for the planning application to be approved. Accordingly the Councillor should not have participated in the decision making and the planning permission was overturned.
11. This case is a useful reminder that the code of conduct is not the last word on determining whether a Councillor can participate in a meeting. It is interesting though to consider whether the City of York Council's code of conduct might have led to the Councillor making a different decision on participating. Under the City Council's code of conduct a housing association would be considered to be a body “exercising functions of a public nature”. The City Council's code says that a Member has a personal interest *“in any business of your authority where it relates to or is likely to affect...”* such a body. A City Councillor would therefore have a personal interest in the matter.
12. The question of whether a personal interest disqualifies a Member from participating depends under the City's Code primarily on whether the interests is such that : “a member of the public with knowledge of the relevant facts would reasonably regard it as so significant that it would be likely to prejudice your judgement of the public interest”. On the facts of this case that test would seem to be satisfied.
13. Under the City's code these rules though only apply to certain categories of interest. They apply, for example, where the matter relates to: *“the determining of any approval, consent, licence, permission or registration in relation to you or any person or body described in the second schedule”*. In this case, though, as the applicant was not the body in which the Councillor had an interest this provision would not apply. It would, however, be caught by the alternative provision which covers interests which: “affect your

financial position or the financial position of a person or body named in the second schedule”.

Recommendations

14. Members are recommended to:

- 1) Note the report and take it into account in considering the report on this agenda relating to the review of the Code of Conduct

Reason: To ensure that the Members are familiar with recent case law.

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**Report
Approved**

Date 16/11/15

Wards Affected: *List wards or tick box to indicate all*

All

For further information please contact the author of the report

Background Papers:

None