GUILDFORD BOROUGH

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To all Councillors

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Dear Councillor

GUIDANCE ON BIAS AND PRE-DETERMINATION IN THE PLANNING PROCESS

In the context of the planning process, I thought it might be helpful for me to write to all councillors in relation to the above.

You will be aware that the Localism Act 2011 has helped to clarify the position with regard to pre-determination and bias.

Section 25(2) of the Localism Act 2011 provides that "a decision maker is not to be taken to have had, or to have appeared to have had, a closed mind when making a decision **just because** –

(a) the decision maker had previously done anything that directly or indirectly indicated what view the decision maker took, or would or might take in relation to a matter, **and**

(b) the matter was relevant to the decision."

The section makes it clear that if a councillor has given a view on an issue, this, considered in isolation, does not show that the councillor has a closed mind on that issue.

Having said this, the use of the words '*just because*' in section 25 suggest that other factors when combined with statements made etc. can still give rise to accusations of predetermination. This has also been the approach that the courts have taken to this issue. When considering whether pre-determination has taken place they will consider all events leading to the decision, (and also, where appropriate, those following the decision) rather than looking at individual events in isolation.

The case law has also made it clear that the words used by particular members and the interpretation put on those words is of particular importance. So care still needs to be taken when making statements in advance of the determination of planning applications as there is a risk that they can be misinterpreted or taken out of context.

With this in mind, it is always advisable to:-

- Adhere to the Council's adopted Code of Conduct for Councillors;
- Be mindful of the applicability of the Council's Probity in Planning - Local Code of Practice
- Avoid giving the impression that you have made up your mind prior to the decision-making meeting and hearing the officer's presentation and any representations made on behalf of the applicant and any objectors.
- If you do comment on a development proposal in advance of the decision, consider using a form of words that makes it clear that you have yet to make up your mind and will only do so at the appropriate time and in the light of the advice and material put before you and having regard to the discussion and debate in the meeting.
- Particular care should be taken where there are chance encounters with partners to development proposals. These are situations where the risk of what you say being misrepresented or taken out of context is particularly high.

Therefore, as a councillor operating within a political environment you should not be afraid to express views on issues. However, in doing so it is important that you avoid giving the impression that you have already made up your mind and that your part in any subsequent decision is a foregone conclusion. Councillor conduct at subsequent decision-making meetings can expose the Council to challenge of the decision making process. As a serving councillor bound by the code of conduct, giving the wrong impression could give rise to a complaint of alleged breach of the code.

A breach of the code is a serious matter and although usually not amounting to a breach of the criminal law, may incur adverse reporting from the Local Government Ombudsman, open the Council's decision to challenge and/or a complaint under the Councillors Code of Conduct.

You may find it useful to read the attached letter from the Department for Communities and Local Government, which was generally made available in May 2013.

Yours sincerely

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Dear David

PREDETERMINATION, BIAS AND ADVICE FROM MONITORING OFFICERS

Thank you for your letter seeking my views on an advice notes from Monitoring Officers to councillors, and how this interacts with the Localism Act. Whilst Ministers cannot give formal legal advice (on advice), I am happy to provide my informal view.

Under the last Administration, the Standards Board regime undermined freedom of speech in local government. This was compounded by a further gold-plating of pre-determination rules, fuelled by misconceptions about the flawed regime, going far beyond what was reasonable or legally necessary.

The Localism Act 2011 has abolished the Standards Board regime, and has also clarified the position with regard to pre-determination and bias. Section 25 clarifies that a councillor is not to be regarded as being unable to act fairly or without bias if they participate in a decision on a matter simply because they have previously expressed a view or campaigned on it. The effect is that councillors may campaign and represent their constituents – and then speak and vote on those issues – without fear of breaking the rules on pre-determination.

In this context, I feel that blanket advice which states that councillors cannot participate in a meeting purely because there is merely a 'perception of bias' or 'risk of bias' is potentially wrong. It will, of course, depend on the individual circumstances, but the flexibilities and freedoms laid out in Section 25 may apply.

It is worth drawing a distinction between **pre- determination** and **pre-disposition**. Councillors should not have a closed mind when they make a decision, as decisions taken by those with pre-determined views are vulnerable to successful legal challenge.[1]

[1] Incidentally, where a councillor has a predetermined view because of having a disclosable pecuniary interest in an item of council business, our guide for councillors makes clear that they may not participate in any discussion or vote and that they should leave the room if their continued presence is incompatible with their council's code of conduct or the Seven Principles of Public Life.

However, before the meeting, councillors may legitimately be publicly pre-disposed to take a particular stance. This can include, for example, previously stated political views or manifesto commitments.

At the decision-making meeting, councillors should carefully consider all the evidence that is put before them and must be prepared to modify or change their initial view in the light of the arguments and evidence presented. Then they must make their final decision at the meeting with an open mind based on all the evidence. Such a fair hearing is particularly important on quasi-judicial matters, like planning or licensing.

More broadly, monitoring officers can offer advice to councillors. But the final decision about whether it is right to participate in discussion or voting remains one for elected members. Councillors should take decisions with full consciousness of the consequences of their actions. I hope the Localism Act has injected some common sense whilst allowing for genuine debate, freedom of speech and democratic representation.

I hope this is of assistance. Further to your suggestion in your original letter, I am placing this letter on my department's website in case it may assist councillors in other local authorities.

BRANDON LEWIS MP