

PREDISPOSITION, PREDETERMINATION AND BIAS Factsheet

Introduction:

Bias and predetermination are not explicitly mentioned in the [Member] Code of Conduct. The Code provisions on declarations of interest are about ensuring you do not take decisions where you or those close to you stand to lose or gain improperly. There is however, a separate concept in law dealing with bias and predetermination, which exists to ensure that decisions are taken solely in the public interest, rather than to further private interests.

Both the courts and legislation recognise that elected councillors are entitled, and indeed expected, to have and to have expressed their views on a subject to be decided upon by their council. Nonetheless, decisions of public authorities do involve consideration of circumstances where a decision-maker must not act in a way that goes to the appearance of having a closed mind and pre-determining a decision before they have all of the evidence before them and where they have to act fairly. Breaches of the rules of natural justice in these circumstances have and do continue to result in decisions of local authorities being successfully challenged in the courts.

To quote a leading judgment "All councillors elected to serve on local councils have to be scrupulous in their duties, search their consciences and consider carefully the propriety of attending meetings and taking part in decisions which may give rise to an appearance of bias even though their actions are above reproach."¹

While declaring interests will to some extent deal with issues of bias, there will still be areas where a formal declaration is not required under the [Member] Code of Conduct, but councillors need to be clear that they are not biased or predetermined going into the decision-making process. Otherwise, the decision is at risk of being challenged on appeal or in the courts.

The Localism Act 2011 has enshrined the rules relating to pre-disposition and predetermination into statute. In essence, you are not taken to have had, or appeared to have had, a closed mind when making a decision just because you have previously done anything that directly or indirectly indicated what view you may take in relation to a matter and that matter was relevant to the decision.

A. What is predisposition?

It is part of a councillor's duties to be open to all views, and for anyone – members of the public or organisations – to be able to have access to them. This means that you can be lobbied by people with a particular interest. Lobbying, however, can lead to your impartiality and integrity being called into question, unless you exercise care and common sense.

Clearly, expressing an intention to vote in a particular way before a meeting (predetermination) is different from where you make it clear you are willing to listen to all the considerations presented at the council meeting before deciding on how to vote (predisposition).

¹ Kelton v Wiltshire Council [2015] EWHC 2853 (Admin)

Predisposition is where you form a provisional view towards a particular outcome, but remain prepared to consider and weigh relevant factors in reaching the final decision.

It is not a problem for you to be predisposed to a particular view. That predisposition can be strong and can be publicly voiced. You may even have been elected specifically because of your views on a particular issue. It might be in favour of or against a particular point of view, for example an application for planning permission. However, you must be open to persuasion and the possibility that, however unlikely, you will hear arguments during the debate about the issue that will change your mind about how you intend to vote. As long as you are willing to keep an open mind about the issue, you are entitled to take part in any vote on it.

B. What is predetermination?

Predetermination is where your mind is closed to the merits of any arguments i.e. you make a decision on the issue, without taking all the merits of any arguments into account. If you are involved in making a decision, you should avoid giving the appearance that you have conclusively decided how you will vote at the meeting, such that nothing will change your mind. This impression can be created in a number of different ways, such as quotes given in the press, and what you have said at meetings or written in correspondence.

C. What is bias?

Bias is where you form or show bias against or in favour of a particular person, company or group or a particular site or locality, and/or give the appearance of bias (bias may include pre-judged ideas based on your own prejudices or political affiliations). It does not matter whether there is actual bias – the legal test for apparent bias is whether a *fair minded observer* aware of all the facts, would conclude there was a *real possibility* of bias.

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

The rules against bias consist of three distinct elements:

- The first seeks accuracy in public decision-making;
- The second seeks the absence of prejudice or partiality on the part of you as the decision-maker. An accurate decision is more likely to be achieved by a decision-maker who is in fact impartial or disinterested in the outcome of the decision and who puts aside any personal strong feelings they may have had in advance of making the decision;
- The third requirement is for public confidence in the decision-making process. Even though you as the decision-maker may in fact be scrupulously impartial, the appearance of bias can itself call into question the legitimacy of the decision-making process. In general, the rule against bias looks to the appearance or risk of bias rather than bias in fact, in order to ensure that justice should not only be done but should manifestly and undoubtedly be seen to be done.

A single councillor who is guilty of bias is enough to strike out the whole decision when challenged before the courts.

D. 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, if you are responsible for making the decision, you should apply the following test: 'would a fair-minded and informed observer, having considered the facts, decide there is a real possibility that you had predetermined the issue or were biased?' However, when applying this test, you should remember that it is legitimate for you to be predisposed towards a particular outcome, as long as you are prepared to consider all the arguments and points made about the specific issue under consideration.

E. 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* – the council cannot be seen to make an unbiased decision, or a decision, which objectively looks impartial, if a councillor is closely connected with one of the parties involved. This type of bias particularly concerns administrative decision-making, e.g. planning and licensing decisions;
- *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;
- *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, this is as long as they do not give the appearance of being bound only by the views of that body. If the councillor makes comments that make it clear that they have already made up their mind, they may not take part in the decision. If the councillor is merely seeking to lobby a public meeting at which the decision is taking place, but will not themselves be involved in making the decision, then they are not prevented by the principles of predetermination or bias from doing so.

It is very difficult to find a form of words which conveys every nuance of these situations and which gets the balance right between the duty to be an active local representative and the requirement when taking decisions, to take account of all arguments in an open-minded way. It cannot be stressed too strongly, however, that the striking of this balance is, ultimately, your responsibility as a councillor.

F. Predetermination or Bias and the Code

There is a difference between breaching the [Member] Code of Conduct and being predetermined or biased. It is perfectly possible to act within the Code and still cause a decision you were involved in, to be defective for predetermination or bias. This is because if you render the decision of the council unlawful due to predetermination or bias, this could reasonably be regarded as bringing your council or your office into disrepute.

G. Find out more – if you are involved in planning and licensing decision-making, the [Probity in Planning Protocol](#) and the [Probity in Licensing Protocol](#) offer further guidance. Advice or clarification can be sought from the Head of Legal Services and Monitoring Officer.

The golden rule is be safe –seek advice if in doubt before you act.