

## **Predisposition, Predetermination or Bias, and the Code**

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Both predetermination and bias have proved to be difficult and controversial issues for many councillors and monitoring officers. Although they are judge-made, common law issues, and not part of the Code of Conduct, Standards for England is publishing this up-dated guide to help clarify the issues.

We originally published a paper on this issue in August 2007. It was based on advice from leading treasury counsel Philip Sales QC, which can also be found on our website.

This new version of the paper aims to clarify the issues involved. It includes examples of where councillors 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.

This area of law is constantly developing which is why the paper has been revised. However, members should refer to their monitoring officers for the most up-to-date position.

### **What is predisposition?**

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It is not a problem for councillors to be predisposed to a particular view. That predisposition can be strong and can be publicly voiced. They may even have been elected specifically because of their views on this particular issue. It might be in favour of or against a particular point of view, for example an application for planning permission.

However, the councillor must be open to the possibility that, however unlikely, they will hear arguments during the debate about the issue that will change their mind about how they intend to vote. As long as they are willing to keep an open mind about the issue they are entitled to take part in any vote on it.

### **What is predetermination or bias?**

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Predetermination is where a councillor's mind is closed to the merits of any arguments which differ from their own about a particular issue on which they are making a decision, such as an application for planning permission. The councillor makes a decision on the issue without taking them all into account.

If councillors are involved in making a decision they should avoid giving the appearance that they have conclusively decided how they will vote at the meeting, such 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 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 a councillor is involved in making, or the decision is quasi-judicial in nature.

### **Making the decision**

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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 as long as they are prepared to consider all the arguments and points made about the specific issue under consideration.

Also the importance of appearances is generally more limited when the context of the decision-making is not judicial or similar to judicial. Planning decisions are not similar to judicial decisions, they are administrative. Therefore councillors can appear strongly predisposed for or against a particular planning decision.

## How can predetermination or bias arise?

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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 councillor 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 councillors is given delegated authority to make the statutory modification Order. They have a private meeting with local representatives of a footpath organisation 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. But 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 which 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. Unlike private lobbying, there is no particular reason why the fact that councillors can address a public meeting 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 councillors 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.

**Predetermination or Bias, and the Code**

There is a difference between breaching the Code 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 bad for predetermination or bias.

Example:

Under the Code, a councillor may take part in considering whether or not to grant a planning application which is recommended for refusal by planning officers and made by a colleague with whom they do not share a "close association". Nevertheless, because the councillor is the Chair of the planning committee, uses his casting vote to decide in favour of his colleague, and regularly shares a car with that colleague when coming to council meetings, this gives rise to an appearance of bias.

**Conclusion**

When making administrative decisions like whether or not to grant planning permission, councillors are entitled to have and express their own views. However, this is 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.


### **Relationship to the Code of Conduct**

The First-tier Tribunal (Local Government Standards in England) in case reference 0352 has also looked at the relationship between the Code and predetermination and gave an indication that where such issues arise there is a potential paragraph 5 **Code breach**. The outcome is likely to depend on the individual circumstances of a case and any other Code issues and breaches. This is because a councillor who renders the decision of a council unlawful due to predetermination could reasonably be regarded as bringing that authority or his office into disrepute.

An important issue for members is that by and large predetermination will not amount to a personal or prejudicial interest. Therefore there is no specific requirement to declare an interest and leave the room under paragraphs 8 to 10 of the Code. Members may however find themselves the subject of a complaint under paragraph 5 on disrepute. This paragraph of the Code has no provision for declaring interests or leaving meetings.

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

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