



# Epping Forest District Council

## **STANDARDS COMMITTEE** **Tuesday, 26th January, 2010**

**Place:** Civic Offices, High Street, Epping  
**Room:** Committee Room 2  
**Time:** 7.30 pm  
**Democratic Services Officer** G Lunnun - The Office of the Chief Executive  
Email: glunnun@eppingforestdc.gov.uk Tel: 01992 564244

### **Members:**

Independent Members: Ms M Marshall (Chairman), G Weltch and M Wright  
District Councillors: Mrs P Smith, B Rolfe, Mrs J H Whitehouse  
Parish/Town Council Representatives: Councillors Mrs D Borton, J Salter and B Surtees

---

### **1. APOLOGIES FOR ABSENCE**

### **2. MINUTES (Pages 5 - 10)**

To approve as a correct record the minutes of the meeting held on 14 July 2009 (attached).

### **3. DECLARATIONS OF INTEREST**

To declare interests in any item on the agenda.

### **4. LOCAL ASSESSMENT OF COMPLAINTS**

(Monitoring Officer) To view a Standards for England DVD (running time 44 minutes) designed to help standards committee members and local authority officers involved in the assessment of complaints. It goes through the stages of pre-assessment, assessment, decision and review. Dramatised case studies are used to demonstrate the criteria that guide each decision, including whether any investigation should be conducted locally or referred to Standards for England.

**5. INFORMAL MEETING OF MEMBERS OF THE COMMITTEE - 13 OCTOBER 2009  
(Pages 11 - 16)**

**Recommendation:**

- (1) To receive the notes of the meeting held on 13 October 2009 (attached);  
and**
- (2) To approve the revised Local Assessment of Complaints – Criteria**

(Monitoring Officer) The notes of the informal meeting held on 13 October 2009 are attached together with revised criteria for the Local Assessment of Complaints.

**6. PREDISPOSITION, PREDETERMINATION OR BIAS, AND THE CODE (Pages 17 - 30)**

**Recommendation:**

**To note Standards for England guidance on Predisposition, Predetermination or Bias and the Code of Conduct**

(Monitoring Officer) The attached updated guidance issued by Standards for England follows a session held at the Annual Assembly in October 2009 which looked at the relationship between bias, predetermination and the Code.

**7. LOCAL ASSESSMENT - EXPERIENCES OF THE PROCESS (Pages 31 - 34)**

**Recommendation:**

**To note a Standards for England summary of discussions (attached) which took place at the Annual Assembly in October 2009 about experiences of the local assessment process since its introduction in May 2008.**

**8. ALLEGATIONS MADE ABOUT THE CONDUCT OF DISTRICT AND PARISH/TOWN COUNCILLORS (Pages 35 - 36)**

(Monitoring Officer) To consider the attached schedule showing the current position.

**9. PLANNING PROTOCOL - REVIEW**

(Monitoring Officer) Officers are continuing to work on a revised Protocol but this cannot be finalised and submitted to the Committee until publication by the Government of a new Members Code of Conduct.

**10. DATES OF FUTURE MEETINGS**

(Monitoring Officer) The calendar for 2009/10 provides for a meeting of the Committee on 13 April 2010.

The draft calendar for 2010/11 provides for meetings of the Committee on 13 July 2010, 12 October 2010, 18 January 2011 and 19 April 2011.

Additional meetings can be arranged as and when required by the Committee.

**11. EXCLUSION OF PUBLIC AND PRESS**

To consider whether, under Section 100(A)(4) of the Local Government Act 1972, the public and press should be excluded from the meeting for the items of business set out below on grounds that they will involve the likely disclosure of exempt information as defined in the paragraph(s) of Part 1 of Schedule 12A of the Act indicated:

<b>Agenda Item No</b>	<b>Subject</b>	<b>Exempt Information Paragraph Number</b>
Nil	Nil	Nil

To resolve that the press and public be excluded from the meeting during the consideration of the following items which are confidential under Section 100(A)(2) of the Local Government Act 1972:

<b>Agenda Item No</b>	<b>Subject</b>
Nil	Nil

Paragraph 9 of the Council Procedure Rules contained in the Constitution require:

- (1) All business of the Council requiring to be transacted in the presence of the press and public to be completed by 10.00 p.m. at the latest.
- (2) At the time appointed under (1) above, the Chairman shall permit the completion of debate on any item still under consideration, and at his or her discretion, any other remaining business whereupon the Council shall proceed to exclude the public and press.
- (3) Any public business remaining to be dealt with shall be deferred until after the completion of the private part of the meeting, including items submitted for report rather than decision.

**Background Papers:** Paragraph 8 of the Access to Information Procedure Rules of the Constitution define background papers as being documents relating to the subject matter of the report which in the Proper Officer's opinion:

- (a) disclose any facts or matters on which the report or an important part of the report is based; and
- (b) have been relied on to a material extent in preparing the report does not include published works or those which disclose exempt or confidential information (as defined in Rule 10) and in respect of executive reports, the advice of any political advisor.

Inspection of background papers may be arranged by contacting the officer responsible for the item.

This page is intentionally left blank

## EPHING FOREST DISTRICT COUNCIL COMMITTEE MINUTES

- Committee:** Standards Committee **Date:** 14 July 2009
- Place:** Committee Room 1, Civic Offices, High Street, Epping **Time:** 7.30 - 9.20 pm
- Members Present:** Ms M Marshall (Independent Member) (Chairman), Councillor B Surtees (Parish or Town Council Representative), Councillor Mrs D Borton (Parish or Town Council Representative), Councillor B Rolfe (EFDC Appointee), Councillor J Salter (Parish or Town Council Representative), Councillor Mrs P Smith (EFDC Appointee), G Weltch (Independent Member) and Councillor Mrs J H Whitehouse (EFDC Appointee)
- Other Councillors:** Mrs A Cooper
- Apologies:** M Wright
- Officers Present:** C O'Boyle (Monitoring Officer), I Willett (Deputy Monitoring Officer), G Lunnun (Allegations Determination Manager) and S G Hill (Local Assessments Manager)
- 

### 1. WELCOME

The Chairman welcomed Councillor Mrs J H Whitehouse on her return to the Committee.

### 2. MINUTES

#### RESOLVED:

That the minutes of the meeting of the Committee held on 14 April 2009 be taken as read and signed by the Chairman as a correct record.

### 3. MATTERS ARISING FROM THE MINUTES OF THE LAST MEETING

#### (a) Members' Training (Minute 33(a))

The Committee noted that approximately 10 members had attended the training course on 26 May 2009 regarding the process for dealing with complaints against councillors about alleged breaches of the Code of Conduct. Councillor Surtees advised that he had been informed that a complex subject had been presented in an informative and useful way.

### 4. DECLARATIONS OF INTEREST

No declarations of interest were made pursuant to the Council's Code of Conduct for Members.

## 5. PLANNING PROTOCOL - REVIEW

The Deputy Monitoring Officer reported on responses following consultation with District Councillors, Parish and Town Councils, Planning Agents and the Director of Planning and Economic Development on the need to review the Planning Protocol.

### (a) Cabinet Members – Conflict of Interest in Planning Matters

In relation to Paragraph 7.2 of the Protocol, attention had been drawn to two issues. The District Council Housing Portfolio Holder had questioned the need to declare a prejudicial interest in a planning matter in relation to a scheme which had been approved before he had become the Portfolio Holder. Officers had drawn attention to the review of Cabinet Portfolios for 2009/2010 as a result of which it was possible a number of different Portfolio Holders could be involved in the formulation of a proposal requiring planning permission.

The Deputy Monitoring Officer drew attention to possible rewording requiring that a prejudicial interest should only apply if the member had been the appropriate Cabinet Member at the time the proposal had been agreed with references to Portfolio Holders in the plural in order to reflect the possible overlap of responsibilities.

Members discussed whether the interest could be affected by a time lapse between the two situations and whether by taking on the responsibility of a Portfolio the member became committed to a project even if not a party to the original decision.

### (b) Property Interests

The Deputy Monitoring Officer reported that the interpretation of Section 8 had been cited in a recent complaint about an alleged breach of the Code of Conduct. He advised that the adjudication on that allegation had not yet been completed and suggested this part of the Protocol be reviewed in the light of the outcome.

### (c) Prejudicial Interests and the Councillor's Representative Role

The Deputy Monitoring Officer drew attention to a query as to how to deal with a situation where more than one councillor sought to exercise their right under the Code of Conduct to address a Planning Committee on a matter in which they had a prejudicial interest.

The Committee considered possible revised wording for the Protocol providing for Councillors to be called in alphabetical order by surname with each member leaving the meeting on completion of their statement. Some members suggested that the order of speaking should be at the Chairman's discretion. The Committee agreed that such members should only be present in the meeting whilst making their representations otherwise those following the first speaker would have an advantage having heard earlier representations.

At this point in the meeting Councillor Mrs Cooper sought to speak as a non member of the Committee. The Chairman, having regard to the length of the agenda and the likelihood of all councillors being able to make further representations on the review of the Planning Protocol as it appeared it would not be completed at this meeting, advised that she was restricting the discussion to members of the Committee only.

**(d) Training Requirements**

In response to the consultation one firm of chartered town planners and design consultants had expressed the view that some members appeared not to have the basic knowledge of planning law to be able to determine applications on planning grounds. The Committee considered the poor level of attendance of both District and Town and Parish Town Councillors at Planning training courses and steps which could be taken to improve the situation. Members suggested that training sessions should be carried out immediately before or immediately after meetings of the District Council's Area Plans Sub-Committees and the District Development Control Committee as this would achieve better attendance. Reference was also made to the ability of members to gain knowledge from the Planning Portal.

**(e) Section 106 Agreements**

The Committee was advised that a District Councillor had drawn attention to the lack of any reference to Section 106 Agreements in the Planning Protocol.

The Deputy Monitoring Officer reported on possible wording suggesting that care should be exercised about the way in which members discussed the question of providing ancillary community benefits through Section 106 Agreements. The Committee agreed that an appropriate paragraph should be included within the Planning Protocol.

**(f) Local Government Association Advice – Probity in Planning**

The Deputy Monitoring Officer drew attention to the LGA publication and suggested that the Planning Protocol would benefit from incorporating advice from this document including clarification of predetermination, predisposition or bias; action to be taken by Cabinet Members; pre-application discussions; public speaking; and Planning Officers' advice. He also advised that he proposed to speak to the Director of Planning and Economic Development about the Codes of Professional Conduct for Planning Officers which was mentioned in the LGA Publication.

**(g) Loughton Town Council**

The Deputy Monitoring Officer reported that Loughton Town Council had suggested that the review of the Planning Protocol should be finalised after the new Code of Conduct had come into force.

**(h) Planning Services Scrutiny Panel**

The Deputy Monitoring Officer drew attention to issues raised by the Scrutiny Panel which would also need to be taken into account in the current review.

**RESOLVED:**

- (1) That the officers revise the Planning Protocol in the light of the issues raised in the consultation exercise, the discussions at this meeting and the issues raised by the Scrutiny Panel;
- (2) That a draft of the revised Protocol be circulated to members of the Committee, District Councillors and Parish/Town Councils for comment in advance of being submitted to a future meeting for consideration;

- (3) That the revised Planning Protocol be finalised after the new Code of Conduct has come into force.

**6. STANDARDS BOARD FOR ENGLAND - ATTITUDE SURVEY AMONG ELECTED MEMBERS**

The Committee noted the results of the survey of Councillors and Council Officers in relation to the Members' Code of Conduct. The survey showed that support for the Code of Conduct and the Local Standards Framework was at a high level.

**7. ALLEGATIONS MADE AGAINST THE CONDUCT OF DISTRICT AND PARISH/TOWN COUNCILLORS**

The Committee noted the current position of allegations made about District and Parish/Town Councillors.

**8. LOCAL COMPLAINT ASSESSMENT AND ADJUDICATION PROCESS - REVIEW**

The Committee considered a report reviewing the Council's Complaints/Local Assessment Process in the light of experience gained since its introduction.

**(a) Officer Roles/Mediation or Conciliation**

In relation to officer roles a member suggested that more emphasis should be placed on advising complainants of other avenues available to resolve an issue bearing in mind the resources required to follow the formal complaints process. The Local Assessments Manager advised that when preliminary discussions were held with a potential complainant all the avenues were explained. However, some complaints only became known on the receipt of a completed form at which stage it was not possible to suggest alternative action.

The Deputy Monitoring Officer drew attention to a report to be made to the Local Councils' Liaison Committee drawing attention to conclusions in the Standards Committee's Annual Report in relation to the number of complaints about Parish/Town Councillors, the vast majority of which had been made by one councillor against another.

The Committee agreed that complaints against councillors by other councillors could be a symptom of other problems and that the challenge was to find the correct way of resolving difficulties within Parish and Town Councils. It was suggested that the Essex and National Associations of Local Councils could intervene with training or conciliation.

**(c) Initial Assessments**

The Committee considered a number of concerns raised by one of their members about the assessment process. The member had questioned the policy to be adopted when a councillor who had been notified that they were the subject of a complaint approached a member of the Standards Committee for advice. Also the practice adopted in a Parish Council of publicly announcing that a complaint had been made.

The officers advised that it was a requirement that Standards Committee members should not advise councillors outside of the formal process as they might have to assess the complaint. Members were advised that Parish/Town Council Clerks were notified when a Parish/Town councillor was subject to a complaint but that this



notification was not for public disclosure for fear of prejudicing the assessment of the complaint. The Committee discussed the timescale for notifying a parish or town council clerk and the subject member of a complaint. The Monitoring Officer agreed to strengthen the Procedure Notes with a view to ensuring that there was no public disclosure of complaints during the assessment/review processes.

The Committee also discussed the initial notification of a complaint to the subject member and the fact that no detail was given of the complaint, this being disclosed only when an investigation had been commissioned.

The Monitoring Officer explained that details of a complaint were not disclosed at the assessment/review stages because there was a need to maintain confidentiality so that an investigation, if required, was not compromised.

#### **(d) Assessment/Review Hearings**

The Committee was advised that one subject member had complained that they had been denied access to Assessment and Review Sub-Committee hearings and that this was against natural justice in that they had not been able to reply to the allegation.

The Monitoring Officer pointed out that Standards Board advice indicated that Assessment and Review hearings should be held in private. The reason was that these stages in the process were designed to assess a complaint at face value and whether there was a potential breach of the Code, not to carry out an investigation. Furthermore it should be borne in mind that potentially unfounded and damaging allegations would be considered and should not be disclosed unless properly investigated for adjudication purposes.

#### **(e) Complaint Investigations – Office Holders**

The Committee was advised that Standards Board advice allowed a complaint to be referred if it was considered local investigation would not be effective because of the position held by a subject member, e.g. Leader, Cabinet Member, Standards Committee Member. The Monitoring Officer suggested that advice to complainants on this aspect needed to be reinforced and that the policy should be one of considering each case on its merits with the arguments for referral to the Standards Board being set out on the agenda for Assessment Sub-Committee meetings.

#### **(f) Grounds for Referral for Investigation**

The Committee agreed with the suggestion that, in advice to complainants and to the Assessment Sub-Committee, complaints should be based on no more than one alleged breach of the Code wherever possible.

#### **(g) Standard Letters**

The Committee noted that action would be taken to strengthen the standard letters of the Standards Board in relation to the invitation to comment on draft investigation reports. In future strict timescales would be imposed and once the specified period had elapsed, a report would be finalised.

**RESOLVED:**

That the suggestions contained in the report and the views of the Committee expressed at this meeting be incorporated into revised Procedure Notes for Officers.

**9. DISPENSATIONS**

The Committee noted that the Standards Committee (Further Provisions) (England) Order 2009 made changes to the criteria for granting dispensations for members to speak and vote when they had a prejudicial interest. The Committee noted the changes and the new guidance issued by the Standards Board to reflect the new regulations.

**RESOLVED:**

(1) That the Standards Board Guidance be issued to District Councillors through the Council Bulletin and that copies of the Guidance be sent to Parish and Town Council Clerks; and

(2) That reference to dispensations be made in the revised Planning Protocol.

**10. DATES OF FUTURE MEETINGS**

The Committee noted that the calendar for 2009/2010 provided for meetings of the Committee held on 13 October 2009, 19 January 2010 and 13 April 2010.

**CHAIRMAN**

# Agenda Item 5

**Notes of an Informal Meeting of Members of the Epping Forest District  
Standards Committee held on 13 October 2009  
6.30 pm – 8.10 pm**

**Present:**

**Independent Members :** Ms M Marshall, G Weltch and M Wright

**District Councillors :** B Rolfe, Mrs P Smith and Mrs J H Whitehouse

**Parish Councillors :** Mrs D Borton, J Salter and B Surtees

**Officers :** C O'Boyle (Monitoring Officer), I Willett (Deputy Monitoring Officer), G Lunnun (Allegations Determination Manager), S Hill (Local Assessments Manager)

## **1. Chairman**

Mary Marshall was elected Chairman of the meeting.

## **2. Purpose of Meeting**

I Willett drew attention to the recent exchange of correspondence with the Clerk of Moreton, Bobbingworth and The Lavers Parish Council from which it was apparent that the Parish Council had been upset by decisions made by the Assessments and Reviews Sub-Committees in response to complaints about a member of the Matching Parish Council. Members agreed that whilst there appeared to have been a breach of confidentiality in relation to the complaints and only a partial picture outlined to the Parish Council there were lessons to be learned from the criticisms made. It was agreed that the issues set out in the briefing paper for this informal meeting should be discussed. I Willett advised that there had been no further response from the Parish Council following his letter to the Clerk dated 6 October 2009.

## **3. Dismissal of Complaints as Trivial**

Noted that the word "trivial" appeared in the Standards Board advice concerning assessment criteria and had been included in the local assessment criteria. Members agreed that the use of the word "trivial" in dismissing a complaint could create a negative response from complainants and almost certainly lead to a request for a review.

### **ACTION:**

**Use of the word "trivial" be replaced in the Assessment Criteria with "the matter is not considered to be sufficiently serious to warrant further action" and that reference to "trivial" in decisions be restricted to those cases where a matter is considered so trivial that it warrants the use of the word.**

#### **4. “Robust Behaviour”**

Noted that the requirements in relation to member on member complaints are generally higher than complaints against a councillor from a member of the public or an officer. Accepted that a set position resulting in all such complaints being dismissed should not be taken as these might involve breaches of the Code which warrant investigation.

#### **5. Last Minute Additions**

Noted that the initial acknowledgement of a complaint draws attention to issues which might need expanding on and gives the complainant a week to provide additional evidence whilst allowing sufficient time to send the papers to the members of the Assessments Sub-Committee a minimum of five clear working days before the meeting.

#### **ACTION:**

**Existing approach and timescales to be maintained.**

#### **6. Withdrawal of Complaints**

Discussed the situation of a complainant seeking to withdraw their complaint prior to the Assessments Sub-Committee having made a decision on it. Noted that it was for the Assessments sub-Committee, not officers, to decide whether to grant such a request.

#### **ACTION:**

**Officers to prepare and submit to the Standards Committee for approval, a framework for the Assessments Sub-Committee to consider such requests, including (a) whether the public interest in taking some action on the complaint outweighs the complainant’s desire to withdraw it; (b) whether the complaint can be pursued without the complainant’s participation; (c) is there an identifiable underlying reason for the request to withdraw the complaint, eg. pressure to do by the subject member.**

#### **7. Budget Considerations**

Agreed that the criticisms of the Parish Council suggesting that complaints were not investigated because of concerns about cost were inaccurate. In accordance with statutory requirements complaints which met the assessment criteria were investigated. I Willett advised that he was now monitoring his costs in relation to investigations and in future at the end of the process would report on the number of hours spent and the notional cost to the Council. Noted that the available budget for the current year was almost exhausted and that any further work required from an external investigator would necessitate the Monitoring Officer being granted additional finance by the Council. Noted that external investigators were given a tight brief which was expanded if necessary during an investigation. Noted that the Standards Board had published figures indicating that the average time to complete an investigation was 100 days.

**ACTION:**

**Monitoring Officer to arrange, if necessary, for an increase in the budget provision.**

**8. Composition of Sub-Committees**

Agreed that there should be more interchange of members between the three sub-committees.

**ACTION:**

- (1) Officers to take account when liaising with the Chairman of the Standards Committee about the make-up of sub-committees.**
- (2) Summary of complaints and outcomes to be reported regularly to the Standards Committee so that all members can gain experience of the circumstances of cases.**

**9. Refusal to Investigate – Repeat Complaints**

Agreed that where there is an open investigation of that kind already in progress it should be possible to add in a further complaint on the same point. This can be contrasted with an investigation which has been completed and is raised again in exactly the same form.

**10. Training**

Agreed that in future member training sessions on the complaints process reference be made to matters which are not covered by the Standards Committee, eg, review of decisions taken by the District or Parish/Town Councils. Also agreed that the Standards Board DVD on Local Assessments might be appropriate to show at such sessions.

**ACTION:**

**Officers to note.**

**11. Assessment Criteria**

Agreed that a revised set of criteria be submitted to the Standards Committee for adoption.

**ACTION:**

**Officers to draft revised criteria taking account of issues discussed at this meeting.**

This page is intentionally left blank

## Epping Forest District – Standards Committee

### Local Assessment of Complaints – Criteria

The Standards Committee will **not** investigate complaints that are:

- Malicious, relatively minor, politically motivated, tit for tat or if the matter is not considered to be sufficiently serious to warrant further action.
- Made anonymously.
- Contain no prima facie evidence of a breach of the Code.
- Where the complainant has not supplied enough information to justify a decision to refer the matter for investigation or to evidence their complaint or have supplied information of too general a nature from which to make a judgement to investigate.
- Where an investigation would serve no useful purpose or is not serious enough to warrant a sanction or where only an apology was appropriate.
- The same, or substantially similar, complaint has already been the subject of a completed investigation or inquiry and there is nothing further to be gained by seeking the sanctions available to the Sub Committee or the Standards Committee and where no new relevant evidence has been submitted.
- Acts carried out in the Member's private life, when they are not carrying out the work of the authority or have not misused their position as a Member.
- About dissatisfaction with a Council decision, about the way the Council conducts or records its meetings, the way the Council has or has not done something.
- Within the Council's complaints process.
- About someone who is no longer a member of either the District Council or a Town or Parish Council within the area, or is a member of another authority.
- More than 1 year has passed since the alleged conduct occurred.
- Not suitable for local investigation (see referral criteria below).
- Where alternative action such as training, mediation would be more appropriate.

The Standards Committee may refer the following cases to the Standards Board for England:

- Where the status of the member(s) being complained of would make it difficult to deal locally with the complaint. For example: Complaints concerning the Leader of the Council, Cabinet member or leading opposition members, Chairman or Standards Committee members.
- Complaints from the Chief Executive, Monitoring Officer or Service Director.
- Instances where a large number of key people are conflicted out or where the authority itself might be perceived to have an interest in the outcome of the case.

- Instances where there has been national attention, or where the Standards Committee feels that the matter turns on an important point of interpretation of the Code (a test case).
- Where there are other public issue considerations, exceptional circumstances or allegations of governance dysfunction that would make it difficult for the authority to deal with the case fairly or speedily.
- Where the Assessment Sub-Committee, having undertaken their initial assessment, believes that the matter should be dealt with at Standards Board level.

### Withdrawal of Complaint

If the complainant asks to withdraw their complaint prior to the Assessment Sub-Committee having made a decision on it, the Sub-Committee will decide whether or not to grant the request. The following considerations will be taken into account when considering such requests:

- Does the public interest in taking some action on the complaint outweigh the complainant's desire to withdraw it; where the complaint raises issues of wider public interest, it may be appropriate for the Sub-Committee to ensure that such wider issues are formally investigated and resolved.
- Where the alleged misconduct is simply a matter of alleged failure on the part of the respondent to treat the complainant with respect, and raises no wider issues of public interest, the Sub-Committee will normally accept such withdrawal.
- Is the complaint such that action can be taken on it, for example an investigation without the complainant's participation.
- Is there an identifiable underlying reason for the request to withdraw the complaint, such as the suggestion that the complainant may have been pressured by the subject member or an associate of theirs to withdraw the complaint.
- Where the complainant submits further evidence demonstrating that the complaint was ill-founded, it may be appropriate to resolve that the complaint as amended shows no evidence of a breach of the Code of Conduct, so that the matter is formally concluded.



## **Standards for England**

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

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, attached as an Appendix.

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?**

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?**

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**

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?**

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 Adjudication Panel for England (APE) 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.

**Published on December 2009.**

This page is intentionally left blank

**IN THE MATTER OF PART III OF THE LOCAL GOVERNMENT ACT 2000**

**AND LOCAL AUTHORITIES (MODEL CODE OF CONDUCT)(ENGLAND) ORDER 2001**

**AND THE DRAFT LOCAL AUTHORITIES (MODEL CODE OF CONDUCT)(ENGLAND) ORDER 2007**

**ADVICE**

1. I am instructed to advise the Standards Board for England concerning guidance it proposes to issue for monitoring officers and councillors regarding the dividing line between (permissible) policy pre-disposition on the part of councillors in relation to matters which they decide upon and (impermissible) pre-determination of such matters by them. I am also instructed to consider draft guidance in layman's terms on this topic, and to amend it as I think appropriate. A copy of the draft guidance as amended and approved by me is attached as an Annex to this Advice.
2. The basic legal position is that a councillor may not be party to decisions in relation to which he either is actually biased (in the sense that he has a closed mind, and has pre-determined the outcome of the matter to be decided irrespective of the merits of any representations or arguments which may be put to him) or gives an appearance of being biased, as judged by a reasonable observer. The test in relation to appearance of bias is that laid down by the House of Lords in *Porter v Magill* [2002] 2 AC 357, at para. [103] per Lord Hope: "the question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased".

3. However, in the current context, in relation to both actual bias and appearance of bias, the question arises: what is to be taken as the relevant dividing line between permissible policy pre-disposition in relation to a particular matter and impermissible pre-determination of a matter? It is only if a councilor actually is, or gives the appearance of being, on the wrong side of that dividing line, that it would be unlawful for him to participate in a decision.
4. In addressing that question, two points should be made at the outset. First, the common law test of bias and appearance of bias falls to be adjusted according to the particular context in which it is to be applied. The test will apply very strictly in relation to courts and tribunals, which are judicial institutions, independent of the parties which appear before them. It will apply less strictly, and only after necessary adjustment for the different context, in relation to administrative decisions and decisions by local government, which are taken by bodies which are in place to promote their own policies and objectives, often in opposition to the interests of particular persons who may be detrimentally affected by their decisions.
5. *Porter v Magill* illustrates this point. The decision of the district auditor which was in issue was taken by an official who combined the roles of investigator, prosecutor and judge in a way which would be regarded as impermissible under Article 6(1) of the ECHR in the case of a court (see paras. [89]-[92]); the common law test for appearance of bias was adjusted to bring it into line with that under Article 6(1) (see paras. [95]-[103]); but when applied to the district auditor, it was held that he had not acted in such a way as to give an appearance of bias (see paras. [104]-[105]). In my view, this judgment indicates that the basic test of appearance of bias falls to be applied with adjustments in a specific case to take account of the particular context in which that case arises. An approach which may be impermissible on the part of a court will not necessarily be impermissible when adopted by an administrative body or by local government.



6. Secondly, it is of the essence of local democratic politics that councillors or parties may seek election by declaring to the electorate what their policies will be if they are elected. It would defeat the object of the exercise if, once elected, they were then to be treated as being barred from participating in those very decisions which they may have been elected to take. Also, the importance and validity of councillors being able to formulate policies and then being permitted to participate in decisions to implement those policies is not confined to what happens at election time. The identification of a particular need or problem which requires to be met as a matter of policy, the formulation of proposals for measures to meet that need or problem and the taking of decisions to implement those measures, is again a normal part of the democratic process and represents one of the major functions of government at any level.
7. The fact that a councillor may have made it clear that he has a policy predisposition to favour a particular outcome in relation to a decision to which he is party does not in itself mean that it is unlawful for him to participate in making that decision. Something more would be required before the conclusion could be drawn that there was unlawful bias or an unlawful appearance of bias on the part of a councillor in relation to a particular decision: an indication that the councillor was not prepared fairly to consider whether the policy he wished to promote should be adjusted, or potentially not applied, in the light of any detailed arguments and representations concerning the particular facts of the case falling for decision.
8. The basic principle is set out in Wade and Forsyth, *Administrative Law* (9<sup>th</sup> ed.) at pp. 472-473 (in terms which, in my view, are equally applicable to local government decisions by councillors):

“It is self-evident that ministerial or departmental policy cannot be regarded as disqualifying bias. One of the commonest administrative mechanisms is to give a minister power to make or confirm an order

after hearing objections to it. The procedure for the hearing of objections is subject to the rules of natural justice in so far as they require a fair hearing and fair procedure generally. But the minister's decision cannot be impugned on the ground that he has advocated the scheme or that he is known to support it as a matter of policy. ... The key to all these decisions is the fact that if Parliament gives the deciding power to a political body, no one can complain that it acts politically. The principles of natural justice still apply, but they must be adapted to the circumstances [reference to *R v Amber Valley DC, ex p. Jackson* [1985] 1 WLR 298]" (emphasis added)

9. See to the same effect Supperstone, Goudie and Walker, *Judicial Review* (3rd ed.) at paras. 11.15.1 to 11.15.16, especially the following:

"In many administrative situations the possibility of bias is built into the system. Proposers of a scheme may have strong and carefully thought-out views on the subject, and yet may have guidelines to help them in their day-to-day application of legislation. In such situations the concept of a fair trial may be impossible and, indeed, undesirable to achieve. It has been pointed out (1932 (Cmd 4060)) that the more indifferent to the aim in view the less efficient is a Minister or civil servant likely to be. After all, it is his job to get things done. So while the obvious prejudgment of an issue is not allowed, a challenge to a decision on the grounds of departmental bias is unlikely to succeed. It is a Minister's job to have a policy and to support it in public" (para. 11.15.4).

10. Again, reference may also be made to De Smith, Woolf and Jowell, *Judicial Review of Administrative Action* (5<sup>th</sup> ed.), at para. 12-048:

"The normal standards of impartiality applied in an adjudicative setting cannot meaningfully be applied to a body entitled to initiate a proposal and then to decide whether to proceed with it in the face of objections. What standards should be imposed on the Secretary of State for the Environment when he has to decide whether or not to confirm a compulsory purchase order or clearance order made by a local authority ...? It would be inappropriate for the courts to insist on his maintaining the lofty detachment required by a judicial officer determining a *lis inter partes*. The Secretary of State's decisions can seldom be wrenched entirely from their context and viewed in isolation from his governmental responsibilities."

11. The passage cited above from Wade and Forsyth (as it appeared in the 8<sup>th</sup> edition) was cited with approval by Lord Slynn in *R (Alconbury) v Secretary of State for the Environment* [2003] 2 AC 295 at para. [48]; see also per Lord Nolan at para. [64]; Lord Hoffmann at para. [123]; and Lord Clyde at paras. [142] to [143]; see also the Scottish case of *London and Clydeside Estates Ltd v Secretary of State for Scotland* [1987] SLT 459.
12. The point is further explained in *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172, in which Cooke J. stated:

“Realistically, it was clear that the government had decided that the project was to go ahead – but it was a fallacy to think that because the Government was highly likely to advise in favour of the Order, that they were disqualified from making a determination”.

13. This approach has been reiterated many times in the local government context. So, for example, the approach in the *Amber Valley* case (above) has been followed in *R v Sevenoaks DC, ex p. Terry* [1985] 3 All ER 226, *R v St Edmundsbury BC, ex p. Investors in Industry Commercial Properties Ltd* [1985] 1 WLR 1157 and *R v Carlisle CC, ex p Cumbrian Co-operative Society Ltd* [1985] 2 EGLR 193. See also, for a recent decision, *R (Island Farm Development Ltd) v Bridgend County Borough Council* [2006] EWHC 2189, in which it was alleged that a decision by a committee of the council not to proceed with a proposed sale of land necessary for a development was vitiated by apparent bias where the relevant councillors had previously expressed their strong objection to the development. Collins J. held there was no bias:

“In principle, councillors must in making decisions consider all relevant matters and approach their task with no preconceptions. But they are entitled to have regard to and apply policies in which they believe, particularly if those policies have been part of their manifestos. The present regime believed that the development ... was wrong and they had made it clear that that was their approach. In those circumstances, they were entitled to consider whether the development could be lawfully prevented ... in the context of a case such as this I do

not believe that bias can exist because of a desire to ensure if possible that the development did not take place.”

14. See also the decision of the Court of Appeal in *National Assembly for Wales v Condron* [2006] EWCA Civ 1573, in which it was held that there was no apparent bias, notwithstanding that the committee chairperson told an objector his conclusion on a planning decision before the relevant committee meeting, because the evidence was that in fact the question was fully considered at the meeting. At paras. [48] to [51], the Court of Appeal observed that evidence that the meeting fully explored relevant issues before reaching its conclusion was of “substantial weight” in determining that there was no apparent bias.
15. This does not mean that a decision by local government councillors cannot be held to be vitiated by actual bias or an appearance of bias. For example, in *Anderton v Auckland City Council* [1978] 1 NZLR 657 the New Zealand Court of Appeal held that, even though Parliament had made the council judge in its own cause by vesting in it the right to hear and determine objections to its own scheme, nonetheless the council had gone beyond the boundary of what was permissible by having become excessively closely associated with the development company’s attempts to secure planning permission for its project that on the facts it had completely surrendered its powers of independent judgment and had determined in advance to allow the application.
16. In my view, the test of lawfulness in this context is whether the councillors in question have genuinely addressed themselves to the relevant issue to be determined by them (weighing relevant considerations, ignoring irrelevant considerations in the usual way), taking into account their policy on that issue and giving weight (it may be, considerable weight) to it, but being prepared fairly to consider also whether the policy they wish to promote should be adjusted, or not applied, in the light of any detailed arguments

and representations concerning the particular facts of the case falling for decision.

17. Finally, I should address a distinct issue raised in the context of the draft guidance. To what extent is it legitimate for a councillor who is not himself a party to a decision to be taken (eg he does not sit on the relevant decision-making committee), but whose ward is affected by the decision, to make representations to the decision-makers seeking to persuade them to act in a particular way? In my opinion, there is nothing illegitimate in a councillor taking such steps to represent the interests of the constituents in his ward. One part of his functions is to represent the interests of his ward in relation to decision-making by the local authority of which he is a member, and this is a legitimate and appropriate way in which he may seek to do that.
18. If those instructing me have any comments or suggested amendments in relation to the draft guidance annexed to this Advice, I would be happy to discuss them. My clients have day to day involvement with these matters, and will have a better understanding than me of the form of guidance which is most likely to be found to be useful by monitoring officers and councillors.

PHILIP SALES QC

11 KBW  
11 King's Bench Walk  
Temple  
London EC4Y 7EQ

5 April 2007

This page is intentionally left blank

## **Local Assessment: sharing lessons learnt**

One of the breakout sessions at our Annual Assembly in October was entitled Local Assessment, sharing lessons learnt. This session took the form of a discussion forum giving delegates the opportunity to share their experiences of the local assessment process since its introduction in May 2008.

Sessions were held in tandem for monitoring officers and standards committee members respectively. This gave each group the opportunity to share with their peers the challenges that had arisen in their authority and the solutions they had developed to meet these challenges. In addition, delegates suggested a number of changes to the local standards framework. We value these suggestions but, clearly, many need further evaluation before a decision could be taken whether to make any changes.

A full breakdown of feedback from the sessions can be found on our dedicated Assembly website, but we thought you might be interested in hearing what some of the main issues discussed were.

### **Top five issues discussed:**

#### **1. Vexatious or Persistent Complainants**

This topic was raised in all four sessions that took place. Potential solutions suggested by delegates included:

- asking for further Standards for England guidance on the definition of what a vexatious complaint is
- change legislation to allow monitoring officers to filter out such complaints and allow committees to refuse complaints from vexatious complainants
- having robust assessment criteria to filter out such complaints at assessment
- to write warning letters to complainants deemed vexatious by the council procedures
- to deliver targeted training
- to publish the average cost of assessing and investigating a complaint.

We are aware that persistent vexatious complainants are causing problems for a number of authorities. This is one area where we intend to provide further guidance for standards committees early in 2010, although we recognise that guidance alone is unlikely to solve this issue.

#### **2. The role of the monitoring officer**

Delegates questioned what role, if any, a monitoring officer should have in filtering out complaints before formal assessment by the standards committee. A variety of suggestions were made including that:

- Standards for England should produce further guidance on what steps monitoring officers can take before assessment
- monitoring officers should be given the power to filter complaints before assessment in consultation with the standards committee chair
- monitoring officers should make the initial assessment decision with any review undertaken by the assessment sub-committee

- monitoring officers should make the initial assessment decision for parish complaints
- there should be discretion to halt the formal process if a local solution is reached.

### **3. Informing the subject member that a complaint has been made**

Currently monitoring officers can take the administrative step of informing a member that a complaint has been made about them. However, the current regulations do not allow them to disclose any details of the complaint. Many delegates felt that this puts monitoring officers in a difficult position, especially in circumstances where the complainant has spoken to the press.

Delegates suggested a number of solutions and changes that they would like to see including:

- asking members in advance whether they would like to be told if a complaint is made about them, and make them aware they cannot be told any details until after the assessment
- giving monitoring officers the discretion to reveal some details of a complaint to the subject member depending on the circumstances, in consultation with the standards committee chair
- requesting guidance from Standards for England on what the subject member should be told prior to assessment
- requesting guidance from Standards for England on what the subject member should be told prior to an investigation.

### **4. Resources**

A number of delegates highlighted problems with finding resources to deal with processing complaints. There were some suggestions that monitoring officers could use the Local Government and Housing Act 1989 to ensure they had adequate resources to perform their functions.

Another suggestion was that parishes should either be asked to contribute or alternatively they should be charged for processing complaints about parish members. Currently parish councils cannot be charged for any costs incurred during the assessment or investigation of a complaint about a parish member.

### **5. Quality of complaint information**

Delegates stated that poorly written complaints and lack of information from the complainant could make it difficult to make an assessment decision.

Delegates suggested that:

- a model complaint form from Standards for England would be helpful (we have already published a complaints form – [click here to download](#)).
- complainants should be encouraged to use, or that it should be mandatory to complete, an official form
- monitoring officers should request further information from the complainant if there is insufficient information to make an assessment decision



- the complainant should be asked what they would like the outcome of the process to be.

We are currently undertaking a [review of the local standards framework](#) and information gathered from the sessions will feed into this review process. However, some of the changes to the standards framework suggested would be difficult to implement as they would require primary legislation to be amended.

A number of requests were made during the sessions for further guidance from Standards for England. We will consider these requests and use the feedback to inform future guidance updates.

This page is intentionally left blank

# Epping Forest Assessments Subcommittee – Active Cases

## As at: 14 January 2010

Year	No.	Case reference no.	Case status	Received - (dd/mm/yyyy)	Investigator
2008	4	EFDC 4/2008	<p>Closed - Hearing Subcommittee held on 19 August 2009</p> <p>Member sanction + retraining</p> <p>Member has sought an appeal from Adjudication Panel for England hearing by written reps on 25 November 2009</p> <p>Revised sanction – three months suspension/apology/conciliation.</p> <p><b>Case now closed</b></p>	18/11/2008	P Mears
2009	6	EFDC 1/2009/A	<p>Open - Referred to MO for investigation - External investigator to be appointed</p> <p>Investigation linked with complaint 5/2009 –</p> <p>Report Received – Further Assessment Subcommittee to be arranged for January 2010</p>	17/02/2009	P Mears
2009	11	EFDC 3/2009	<p>No action - review requested - Hearing Subcommittee held on 21 April - Passed for investigation by MO – Final report not yet received</p>	23/02/2009	I Willett Referred on 8/6/9

Year	No.	Case reference no.	Case status	Received - (dd/mm/yyyy)	Investigator
2009	13	EFDC 5/2009	Review held on 2 June 2009 –Combined with complaint 1/2009/A – see above comment  Report Received – Further Assessment Subcommittee to be arranged for January 2010	12/03/2009	P Mears
2009	14	EFDC 6/2009	Assessment Panel – 27 October 2009  Police investigation result: HFA  Referred to Standards for England – Ethical Standards Officer appointed for investigation.	01/10/09	n/a
2009	15	EFDC 7/2009	considered 20 November 2009 – No action – deadline for review request 23 December 2009	14/10/09	n/a
2009	16	EFDC 8/2009	Assessment Subcommittee held 8 December 2009 – Referred to Standards for England	19/11/09	n/a
2009	17	EFDC 9/2009	Assessment Panel 21 December 2009 – referred for investigation by Monitoring Officer	30/11/09	Not yet appointed
2009	18	EFDC 10/2009	Assessment Panel 21 December 2009 - referred for investigation by Monitoring Officer	1/12/09	Not yet appointed