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 I am also instructed to consider draft guidance in layman's terms on this topic, and to amend it as I think appropriate. A copy of the draft guidance as amended and approved by me is attached as an Annex to this Advice.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 pre-disposition 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* (9th 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* (5th 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 8th 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.

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