

BIAS IN DECISION MAKING – HOW TO RECOGNISE AND AVOID IT

A SIMPLE GUIDE FOR COUNCILS IN OXFORDSHIRE

1. Local authorities must act within the law. The law provides that decisions which are tainted by bias may be quashed by the Courts. Successful challenges to the legality of a decision are costly and time consuming. The purpose of this guide is to help Members identify the issue and provide advice as to how to respond to it.
2. If, as a Councillor, you have a disclosable pecuniary interest (DPI) in a matter being discussed at a meeting, then this will be presumed bias and you should declare your interest and withdraw from the meeting room. You should not use your public office to seek information or to influence in any way a matter in which you have a DPI. As well as vitiating the decision, you may be committing a criminal offence which is punishable by a fine or imprisonment and which may also result in you being disqualified from office.
3. A more difficult area is that of apparent bias. This is where you do not have a DPI in a particular matter but some other interest you have in the matter or your actions in relation to it make your participation in the decision untenable.

The question that a Court would ask itself is whether a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the decision maker was biased. In the local government context the decision maker might be a single Councillor but is more likely to be a number of Councillors meeting as a Committee, Cabinet or as the entire Council. It may only require one Member to be biased for the decision to be vitiated, even if the majority on the decision making body are not. This rule applies to any decision of an Authority, regardless of its nature.

4. The test that the Court applies is an objective one. What would the fair minded and informed observer think of it? Not, do you think you are biased (which would be a subjective test). The hypothetical fair minded observer is assumed to be a reasonable member of the public who is neither complacent nor unduly sensitive or suspicious. There are a couple of scenarios which are particularly likely to raise issues of apparent bias.
5. The first scenario concerns predetermination. This is where things you do or say in advance of, or at, a meeting suggest that your mind is completely made up regardless of any information available to you when the decision is actually made. The law says that you must keep an open mind but the

law also recognises that you may hold and express strong views, just so long as your mind is not completely closed on an issue. Of course, one never knows the mind of another, so this scenario only ever arises when a Councillor has chosen to be outspoken on an issue.

Generally speaking, it is advisable to avoid being outspoken on regulatory issues where individual rights or interests are being determined.

6. The second scenario concerns conflicts of interest. This is where other personal interests that you have (which do not qualify as DPI's) e.g. being a trustee of a charity or sitting on the management body of a local body or living in close proximity to a planning application site or being related to an applicant for a permission or licence, might be perceived as preventing you from giving objective consideration to an issue. Whilst such interests would not normally prevent you from participating in a decision there may be situations where the matter being discussed is so significant for and closely connected with the interests of the other body that a fair minded and informed observer would think there to be a real possibility of bias. This is an area where seeking advice is particularly important.
7. In both of these scenarios, if you consider that there may be apparent bias then you should not participate in the decision and it is advisable to leave the meeting room for that item. Whilst there is no requirement to declare your 'interest' (as you must do for DPI's) , you may wish to do so in order to signal, clearly, your non-participation and withdrawal.
8. If you are in any doubt about these scenarios or any others then you should always seek the advice of your Monitoring Officer (for Principal Councils) or Clerk (for Parish Councils). This guide has been produced by the Monitoring Officers of the Oxfordshire Authorities in consultation with the Oxfordshire Association of Local Councils and we hope that Councillors find it helpful.

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Code of Members Conduct

This code of conduct is adopted pursuant to the council's duty to promote and maintain high standards of conduct by members and co-opted members⁴ of the council.

This code applies to you as a member or co-opted member of this council when you act in that role and it is your responsibility to comply with the provisions of this code.

General obligations

Selflessness

You must serve only the public interest and must never improperly confer an advantage or disadvantage on any person including yourself.

Objectivity

In carrying out public business you must make decisions on merit, including when making appointments, awarding contracts or recommending individuals for rewards or benefits.

Accountability

You are accountable for your decisions and actions to the public and must submit yourself to whatever scrutiny is appropriate to your office.

Openness

You must be as open as possible about your actions and those of your council, and must be prepared to give reasons for those actions.

Honesty and Integrity

You must not place yourself in situations where your honest and integrity may be questioned, must not behave improperly and must on all occasions avoid the appearance of such behaviour.

⁴ A 'co-opted member' for the purpose of this code is, as defined by the Localism Act section 27 (4) "a person who is not a member of the council but who

- a) Is a member of any committee or sub-committee of the council, or
- b) Is a member of, and represents the council, on any joint committee or joint sub-committee of the council;

and who is entitled to vote on any question that falls to be decided at any meeting of that committee or sub-committee"

Leadership

You must promote and support high standards of conduct when serving in your public post, in particular as characterised by the above requirements, by leadership and example in a way that secures or preserves public confidence.

Specific Obligations

You must treat others with respect and ensure that you are aware of and comply with all legal obligations that apply to you as a member of co-opted member of the council and act within the law (this includes not participating in decisions where a fair minded and informed observer would conclude that there is a real possibility of bias);

You must not bully⁵ any person

You must not do anything that compromises or is likely to compromise the impartiality of those who work for, or on behalf of the council.

You must not disclose information given to you in confidence by anyone, or information acquired by you of which you are aware, or ought reasonably to be aware, is of a confidential nature except where:

- i. You have the consent of a person authorised to give it;
- ii. You are required by law to do so;

The disclosure is made to a third party for the purpose of obtaining professional legal advice provided that the third party agrees not to disclose the information to any other person, or

The disclosure is:

reasonable and in the public interest;
made in good faith and in compliance with the reasonable requirements of the council

⁵ Bullying is defined as offensive, intimidating, malicious, insulting or humiliating behaviour which attempts to undermine, hurt or humiliate an individual or group. It can have a damaging effect on a victim's confidence, capability and health. Bullying conduct can involve behaving in an abusive or threatening way, or making allegations about people in public, in the company of their colleagues, through the press or in blogs. It may happen once or be part of a pattern of behaviour, although minor isolated incidents are unlikely to be considered bullying.

You must not improperly use knowledge gained solely as a result of your role as a member for your own personal advantage.

When making decisions on behalf of or as part of the council you must have regard to any professional advice provided to you by the council's officers.

When using or authorising the use by others of the resources of the council: You must act in accordance with the council's reasonable requirements;

You must make sure that you do not use resources improperly for political purposes and do not use them at all for party political purposes.

Registering and Declaring Interests

You must, within 28 days of taking office as a member or co-opted member, notify the council's monitoring officer of any disclosable pecuniary interest as defined by regulations made by the Secretary of State, where the pecuniary interest is yours, your spouse's or civil partner's, or is the pecuniary interest of somebody with whom you are living with as a husband or wife, or as if you were civil partners.

You must disclose the interest at any meeting of the council at which you are present, where you have a disclosable interest in any matter being considered and where the matter is not a 'sensitive interest'.⁶

Following any disclosure of an interest not on the council's register or the subject of pending notification, you must notify the monitoring officer of the interest within 28 days beginning with the date of disclosure.

Unless dispensation has been granted, you may not participate in any discussion of, vote on, or discharge any function related to any matter in which you have a pecuniary interest as defined by regulations made by the Secretary of State. You must withdraw from the room or chamber when the meeting discusses and votes on the matter.

⁶ A 'sensitive interest' is described in the Localism Act 2011 as a member or co-opted member of a council having an interest, and the nature of the interest being such that the member or co-opted member, and the council's monitoring officer, consider that disclosure of the details of the interest could lead to the member or co-opted member, or a person connected with the member or co-opted member, being subject to violence or intimidation.

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