

**BRIDGEND COUNTY BOROUGH COUNCIL**

**REPORT TO COUNCIL**

**18 JANUARY 2012**

**REPORT OF THE MONITORING OFFICER**

**LOCALISM ACT 2011**

**1. Purpose of Report.**

- 1.1 The purpose of this report is to inform Council of the coming into force of Section 25 of the Localism Act 2011 on the 15<sup>th</sup> January. This report is intended to provide a broad overview of the provision and its implications. Specific legal advice will be needed on the implications of Section 25 in particular circumstances.

**2. Connection to Corporate Improvement Objectives/Other Corporate Priorities**

- 2.1 The report deals with the overall probity of decision making and therefore has a potential impact on all priorities.

**3. Background.**

- 3.1 The issue of predetermination has been a problem in the practice of its implementation in local government for decades. The Act seeks to clarify the rules on predetermination and in doing so enable Councillors to express opinions on issues of local importance without fear of legal challenge.
- 3.2 Issues of Bias and Predetermination are an ongoing concern within local government and have been seen as a bar to local councilor ability to fully represent the electorate. The position is particularly acute when dealing with Members elected into power in respect of a particular issue, who then find it difficult to pursue that issue once in office due to previous campaigning.
- 3.3 Against these issues has been the view, as an issue of natural justice, that it is wrong for members to come to a decision prior to hearing all sides of the argument and debate.
- 3.4 The position has not been assisted by decisions within the courts being changeable. The law split to draw the distinction between 'Bias' ie having a personal interest in the decision' and Predetermination, ie having a closed mind. Problems in proving predetermination have been reduced, it being unlikely that there be an admission when challenged, by the Courts moving to a test of 'apparent' predetermination. In *Porter v Magill* [2002] 2 AC 357: "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."

- 3.5 In time a new distinction was drawn, between 'predetermination', which is unlawful, and 'predisposition', which is not. Members will be aware of *R (On the Application of Island Farm Development & Anorher) v Bridgend County Borough Council* [2006] EWHC Admin 2189 and later *Persimmon Homes Teeside Limited v R (on the application of Kevin Paul Lewis)* [2008] EWCA Civ 746. In both the Courts recognised that councillors will legitimately have firm views about issues which they have to decide, and will have expressed those views, and that this should be allowed when predisposed.
- 3.6 Currently it can be argued that the common law is on the side of enabling local government to function, it will take strong evidence to show an unlawful decision as a result of predetermination although; an 'over my dead body' view will still suffice, as will a promise to the electorate to support against or for a planning application.

#### **4. Current situation / proposal.**

##### **4.1 Section 25 provisions**

S 25( 2) sets out the following:-

A decision maker is not to be taken to have had, or appeared to have had, a closed mind when making a decision just because:-

- (a) the decision maker has previously done anything that directly or indirectly indicated the view the decision maker took, or would or might take, in relation to a matter and
- (b) the matter was relevant to the decision

It applies to litigation (generally appeal proceedings, but in particular Judicial review) which challenges the validity of a Council's decision on the basis of bias or pre-determination or otherwise.

Where the litigation relies on proving that the Member had predetermined, the person bringing the case cannot rely on the anything previously done or said which related to the decision as evidence of a closed mind on the part of the Member. This will include statements at public meetings, comments in the press or participation in Community Council meetings by County Council members.

Statute therefore limits a challenge which relies on establishing pre-determination by reference to prior comment or statements.

##### **4.2 Where does this leave Pre-Determination and Bias?**

Public Law Requirements

There is a limit however to the impact of the legislation. In reaching a decision Members are required to take into account all relevant factors and disregard that which is irrelevant.

These issues will vary from decision to decision but, for example, where there is a requirement for a public consultation a predetermination can lead to challenge on the grounds that the consultation was not carried out properly i.e. it was not considered. Equally the Common law can still intervene where a decision is so unreasonable that no reasonable Authority would make it (Associated Provincial Picture Houses v Wednesbury Corporation [1947] 1 KB 223).

#### **4.3 Model Code of Conduct**

Paragraph 8 of the Members Model Code of Conduct requires Members to reach decisions on the merits of the circumstances involved and in the public interest, having regard to any advice provided by officers. The Guidance from the Ombudsman identifies pre-determination and bias as relevant evidence relating to this provision and compliance. However, Section 25, because it is only relevant to situations where the validity of a decision is challenged, does not affect this requirement and Members remain bound by the Model Code.

#### **4.4 Quasi Judicial Hearings**

These are situations where Members sit on a Committee, Sub Committee or Panel to conduct a hearing and have to independently weigh up evidence particularly relating to the rights of individuals & organisations. Examples include; Standards Committee hearings, Licensing Applications, Employment Panels or appeals etc. These decisions are subject to wider legal constraints and must provide overall fairness. There are common law rights to a fair hearing and requirements of the Human Rights Act 1998 (Article 6) which imposes a similar requirement.

In these cases appeals or challenges to external tribunals will not challenge the validity of the decision in question but rather seek redress or re-determination of the issue. The legal risk to the Council of failing to hold a fair hearing is reflected in awards of compensation, damages or costs .

It is unlikely in these cases that Section 25 would protect the Council where procedural fairness is an issue for a tribunal. Members participating in such decisions will be advised that they must not create an impression of bias or pre-determination for these reasons.

#### **4.5 Conclusion**

The primary concern is the risk to the decision making processes of the Authority. In general terms, the new legislation provides a smaller risk of successful challenge in cases of pure predetermination.

As this report has provided however; it is unlikely that the position will be straight forward, there being an alternative avenue of challenge. Even when determined to be lawful, a predetermination can lead to the overturning of a decision and a reference under the Model Code of Conduct. Members are advised to take advice in the event of being unsure of their own position, the general advice remains however that in coming to any decision a Member should consider all of the facts of that matter prior to making a decision.

**5. Effect upon Policy Framework& Procedure Rules.**

5.1 There is no effect

**6. Equality Impact Assessment**

6.1 There are no equality implications in this report

**7. Financial Implications.**

7.1 The Report has no financial implications.

**8. Recommendation.**

8.1 That Members note the report and take individual advice as required.

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**Background documents: None**