

Revised August 2014

PREDETERMINATION

Introduction

1. Decisions made by local authorities and other public bodies which are based on bias or predetermination have always been open to legal challenge by judicial review. There is useful caselaw which gives guidance on how decision-makers such as councillors should avoid bias and predetermination (see paragraphs 11-12 below).
2. Being predetermined is different from having a disclosable interest. Issues of conduct may occur alongside those of predetermination but, equally, the two issues may occur entirely separately. For example being determined to oppose building next to your own house may be both ; being opposed to building at the other end of the village may be predetermination but may not be a disclosable interest.

Section 25 of the Localism Act 2011

3. S.25 of the Localism Act 2011 (“the 2011 Act”) is intended to deal with challenges to the validity of decisions taken by parish councils (or in Wales a community council) because a member or co-opted member is alleged to have had a closed mind when voting. The full text of s.25 is in the Appendix to this LTN.
4. A ‘co-opted member’ of a relevant authority is defined as a person who is not a member of the authority but who (a) is a member of any committee or sub-committee of the authority, or (b) is a member of, and represents the authority on, any joint committee or joint sub-committee of the authority, and who is entitled to vote on any question which falls to be decided at any meeting of the committee or sub-committee.

5. 'Relevant authorities' includes all principal authorities in England and Wales, parish councils in England, community councils in Wales, National Park Authorities and the Broads Authority.

Purpose and objectives of section 25 of the 2011 Act

6. By introducing s.25, the Government has not attempted to change caselaw in respect of predetermination and bias but it has attempted to clarify it.
7. The explanatory notes to the 2011 Act in relation to s.25 say that it 'clarifies how the common law concept of "predetermination" applies to councillors in England and Wales'.
8. 'Predetermination occurs where someone has a closed mind, with the effect that they are unable to apply their judgment fully and properly to an issue requiring a decision. Decisions made by members and co-opted members of relevant authorities later judged to have predetermined views have been quashed. [I]f members or co-opted members have given a view on an issue, this does not show that they have closed minds on that issue. If they have campaigned on an issue or made public statements about their approach to an item of council business, they will be able to participate in discussion of that issue in the council and to vote on it if it arises in an item of council business requiring a decision.'
9. S.25 provides that a member or co-opted member is not to be taken to have had a closed mind 'just because' they 'had previously done anything that directly or indirectly indicated what view he/she took, or would or might take, in relation to a decision'.
10. It must be remembered that predetermination is different from pre-disposition. There are no restrictions on a member or co-opted member holding a provisional view on an issue (pre-disposition) but there is a problem if he/she acts with a closed mind on a subject (predetermination).

The courts

11. In a number of cases including R. (on the application of Island Farm Development Ltd) v Bridgend CBC (2006) and the Court of Appeal decision in

R. (on the application of Lewis) v Redcar and Cleveland BC (2008) the courts have already gone a long way in recognising that councillors need to be councillors and that not all that they think or say beforehand is necessarily what they do at the point of decision making - they may be swayed by argument at the meeting.

12. In National Assembly for Wales v Condon and another [2006] the court recognised that there is a two stage test for predetermination. First the behaviour complained of has to be relevant to the issue. Second the situation has to be one where a notional fair-minded and well-informed observer, looking objectively at all circumstances, would consider that there is a real risk that the decision maker has refused even to consider a relevant argument or would refuse to consider a new argument.
13. In both the courts and the 2011 Act there is a presumption against predetermination by local decision makers. This is to enable democracy to work in the way it has developed.
14. But the presumption that there is no closed mind can be rebutted. In a situation where a member said something like "over my dead body" in respect of voting a particular way on an issue, the 2011 Act does not change the legal position that if the member could be shown to have approached a decision with a closed mind, that could affect the validity of the decision. In other words it is for a complainant to prove that a closed mind existed in a particular case rather than for one to be assumed by any set of circumstances.
15. So, if a member had expressed views on a particular issue but when taking the decision they had approached this with an open mind and taken account of all the relevant information, they will not have predetermined the issue.
16. However, the more extreme the view expressed by a councilor, the more difficult in practice it will be to be able to get away from the impression that they would approach the decision with a closed mind.

Examples where there is no predetermination

- a) A councillor who stated that he was against any further development in the community. Subsequently voting against a planning application does not show predetermination.

- b) A parish councillor is also a councillor on the local planning authority. He would not have predetermined his view on a planning application to be decided by the principal authority just because the parish council had already considered and he had voted for or against that planning application. The important issue is that the councillor must be prepared to reconsider the planning application at principal authority level in the light of the material information and considerations presented there.
- c) A councillor who helped a resident to object to a new play area. She would not have predetermined the issue if she subsequently voted against a motion to have the play area just because of helping the resident.
- d) A councillor's pre-election campaign included opposing a proposed incinerator. After he was elected, he voted to end the negotiations to sell local council land for development of an incineration plant. There is no presumption that the councillor has predetermined his decision because of his election campaign statements.
- e) A councillor's political group on a community council has a planning policy which supports housing development in the area. The councillor votes to support a new affordable housing development in the area. The policy in itself is not evidence of the councillor's closed mind about the affordable housing scheme. When voting on a decision to support a particular planning application, the councillor would have to have regard to considerations which are specific to the application even though because of his political group's planning policy he might be predisposed to be in favour of it.

Summary

- 17. In all the above examples, a council's decision will be safe from a successful legal challenge if the councillors' approach is objective and fair and they consider all the relevant and material issues.
- 18. If there is evidence of predetermination by one or more councillors then the council decision could be subject to a successful Judicial Review. The decision could be quashed and the council would have to reconsider and re-make the decision without the predetermination.

19. In practice many of such challenges come from individuals or companies that have had planning applications adversely commented upon or refused.

Other relevant Legal Topic Notes (LTNs):

LTN	Title	Relevance
5	Parish, Town and Community Council Meetings	Sets out the relevant principles in respect of decision making
7	Non-Councillor Members of Committees	Sets out the relevant principles in respect of decision making.
15	Legal Proceedings	sets out judicial review proceedings

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Appendix

LOCALISM ACT 2011

Section 25

(1) Subsection (2) applies if—

(a) as a result of an allegation of bias or predetermination, or otherwise, there is an issue about the validity of a decision of a relevant authority, and

(b) it is relevant to that issue whether the decision-maker, or any of the decision-makers, had or appeared to have had a closed mind (to any extent) when making the decision.

(2) A decision-maker is not to be taken to have had, or to have appeared to have had, a closed mind when making the decision just because—

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

(b) the matter was relevant to the decision.

(3) Subsection (2) applies in relation to a decision-maker only if that decision-maker—

(a) is a member (whether elected or not) of the relevant authority, or

(b) is a co-opted member of that authority.

(4) In this section—

“co-opted member”, in relation to a relevant authority, means a person who is not a member of the authority but who—

(a) is a member of any committee or sub-committee of the authority, or

(b) is a member of, and represents the authority on, any joint committee or joint sub-committee of the authority,

and who is entitled to vote on any question which falls to be decided at any meeting of the committee or sub-committee;

“decision”, in relation to a relevant authority, means a decision made in discharging functions of the authority, functions of the authority's executive, functions of a committee of the authority or functions of an officer of the authority (including decisions made in the discharge of any of those functions otherwise than by the person to whom the function was originally given);

“elected mayor” has the meaning given by section 9H or 39 of the Local Government Act 2000;

“member”—

(a) in relation to the Greater London Authority, means the Mayor of London or a London Assembly member, and

(b) in relation to a county council, district council, county borough council or London borough council, includes an elected mayor of the council;

“relevant authority” means—

(a) a county council,

(b) a district council,

(c) a county borough council,

(d) a London borough council,

(e) the Common Council of the City of London,

(f) the Greater London Authority,

(g) a National Park authority,

(h) the Broads Authority,

(i) the Council of the Isles of Scilly,

(j) a parish council, or

(k) a community council.

(5) This section applies only to decisions made after this section comes into force, but the reference in subsection (2)(a) to anything previously done includes things done before this section comes into force.

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