

Dated 29 August 2018

Chief Executive

Legal Briefing Note

relating to Interests, Bias and Predetermination of Members when considering proposals for local government reorganisation in Leicestershire

1. Background

- 1.1 Leicestershire County Council (**County**) is in the process of drawing up proposals for the reorganisation of local government in Leicestershire. County's stated preference is for the county's district councils to join with County to form a Unitary Authority.
- 1.2 The process set out by County in its cabinet report dated 6 July 2018 indicates a number of meetings to be held by County (both at cabinet and full council level) at which proposals will be considered and decisions made. District Councils are planning their own series of meetings to run alongside County's timetable. In order to ensure that all decisions are properly made, so as to reduce the risk of challenge by way of Judicial Review, all elected members of the various districts will need to carefully consider their eligibility to take part in these decisions. In particular, members who are elected both to County and a district council (**Dual-Hatted Members**) will need to consider questions of interests, bias and predetermination.
- 1.3 The specific situation of each individual member will depend on a number of factors, including:
 - 1.3.1 The proposals set out by County;
 - 1.3.2 The decision that members are being asked to make at a particular meeting;
 - 1.3.3 Whether they are a Dual-Hatted Member;
 - 1.3.4 Any votes they have cast as member of another council;
 - 1.3.5 Any public statements that each member has made previously.
- 1.4 This note sets out the underlying law in relation to interests, bias and predetermination that all members will need to consider before taking part in any decision relating to local government reorganisation. The specific situation of any particular member is beyond the scope of this note but the Monitoring Officer is available to provide assistance to any member who requires help in applying these principles to their particular situation.

2. Members' Code of Conduct and Interests

- 2.1 Elected members are bound to comply with the [Code of Conduct of North West Leicestershire District Council](#). This contains provisions relating to members' interests.

2.2 Disclosable Pecuniary Interests

The Relevant Authorities (Disclosable Pecuniary Interests) Regulations 2012 define a Disclosable Pecuniary Interest (**DPI**) as "*any employment, office, trade, profession or vocation carried on for profit or gain*". The Dual-Hatted Members hold an "office" within the terms of these regulations. The question is whether they undertake that office (when considering the various member allowances) for "profit or gain". Whilst "profit or gain" clearly links to financial benefit, the question of whether this extends to member allowances has not been decided by the courts and the Local Authorities (Members' Allowances) (England) Regulations 2003 are silent on the point.

- 2.3 The government guidance which accompanies the regulations says that they are taxable as employment for the purposes of HMRC. The enabling legislation; S18(1) Local Government and Housing Act 1989; allows the Secretary of State (**SoS**) to make regulations on members allowances and he has done so with the 2003 Regulations referred to above. S18(1) can be contrasted with S18(2) which says that the SoS can “also” make regulations which allow councils to include, within their scheme, an allowance for loss of earning and expenses. No such regulations have been made. This would tend to indicate that the 2003 regulations made under S18(1) are about offering members some recompense for their time and effort in being a member and not intended to put them in the position that they would have been in had they been working – i.e. profiting or gaining from their role. This principle is likely to apply to both Basic Allowances and Special Responsibility Allowances (**SRA**) but, as stated above, there is no judicial or ministerial guidance on the point so it cannot be said for certain.
- 2.4 In addition to the question of whether a DPI exists, members must consider whether a DPI relates to the matter in question. A member with an SRA could possibly have a DPI depending on the matter being decided and the link between the SRA and the matter. For example, observer could wonder whether a Dual-Hatted Member making a decision at district level could be influenced to make a decision on the basis of a desire to preserve an SRA at County. This is something which members should think about but in general it is unlikely that the link is strong enough to constitute a DPI in this matter. Given the uncertainty over whether allowances even constitute a DPI, members would be taking a very precautionary approach if they recused themselves on the basis of “what does it look like”.
- 2.5 The risk of failing to declare a DPI is on the member and, it is potentially a criminal matter. Declaring a DPI would mean that they could not participate in the debate, stay in the room or vote. Members should think about their position in light of the above but on balance it is unlikely that even Dual-Hatted Members would have a DPI.
- 2.6 **Disclosable Non-Pecuniary Interests**
- Members who are Dual-Hatted Members will have a Disclosable Non-Pecuniary Interest, under paragraph 9(2)(iv)a) of the Members’ Code of Conduct, in items regarding the unitary status proposals. This is because as well as being a district member, they are also a member of a body exercising functions of a public nature; namely County. Members with a Disclosable Non-Pecuniary Interest can remain in a meeting, take part in a debate and vote unless to do so would compromise their impartiality or any other obligations set out in the Code. Therefore those members will need to think about the broader obligations under the Code such as:
- 2.6.1 The need to have regard to relevant advice (para 6.1);
 - 2.6.2 The need to give reasons for their decision (para 6.2 and 6.4)
 - 2.6.3 The requirement to make choices based on merit (para 6.3)
 - 2.6.4 Bringing the authority into disrepute (para 5.1)
 - 2.6.5 “Nolan” principles at the beginning of the code re integrity, openness etc.
- 2.7 The risk of failing to declare a disclosable non-pecuniary interest or taking part in a decision when any other element of the code of conduct has potentially been

compromised is to the member him/herself as it could lead to a complaint being made to the Monitoring Officer under the Member's Code of Conduct.

3. Bias and Predetermination

3.1 The law on bias and predetermination (which is a particular form of bias) is part of the general legal obligation on public authorities to act fairly. In short, decision makers are entitled to be **predisposed** to a particular view. However, **predetermination** occurs when someone closes their mind to any other possibility beyond that predisposition with the effect that they are unable to apply their judgement properly and fully to an issue requiring a decision.

3.2 S25 of the Localism Act 2011 clarified the common law position on predetermination. It said that, in the event of a challenge to the validity of a decision (i.e. a Judicial Review) then:

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.

3.3 The mere fact that a member has campaigned on an issue or made public statements about their approach to an item of council business does not prevent that councillor from being able to participate in discussion of that issue and to vote on it. Having said this, the use of the words 'just because' in section 25 suggest that other factors when combined with statements made could still give rise to accusations of predetermination.

3.4 The courts recognise two types of predetermination – actual and apparent.

3.4.1 **Actual predetermination** is when a person has closed their mind to all considerations other than an already held view.

3.4.2 **Apparent predetermination** is where a fair-minded and well-informed observer, looking objectively at all circumstances, considers that there is a real risk that one or more of the decision-makers has refused even to consider a relevant argument or would refuse to consider a new argument.

3.5 The risk of members taking part in a decision where there is actual or apparent bias is to the decision of their council and a Judicial Review action being brought by parties who wished to see an alternative decision being made. It is appropriate that members have clear, proactive advice on this point to give them the opportunity to consider their continued participation in meetings, recuse themselves if necessary and ensure that their council can make a robust decision, capable of withstanding legal challenge.

3.6 The courts have decided that the fair-minded and informed observer has access to all the facts, is neither complacent, unduly sensitive nor suspicious when looking at the facts, is able to decide between the relevant and irrelevant and on the weight to be

given to the facts, and is aware of the practicalities of local government. This person is clearly not the same as the “man in the Clapham omnibus”. The threshold, in the context of administrative decisions, of the test of apparent predetermination, is an extremely difficult test to satisfy. Unless there is positive evidence that there was indeed a closed mind, prior observations or apparent favouring of a particular decision it is unlikely to be sufficient to establish predetermination. However, defending a Judicial Review claim is time consuming, costly, reputationally damaging and something which should be avoided.

- 3.7 It is important that members are mindful about making statements or sharing information on this topic before being asked to debate the topic or attend meetings at the Council. Members may wish to have initial views and be predisposed to a particular outcome, but they should be prepared to approach the matter with an open mind. They should be prepared to read the reports provided by the Council, have regard to the advice from officers and make decisions based on the interests of the communities of their district.
- 3.8 It is understood that this is an emotive matter in which there is likely to be significant interest locally with our parish councils and wider communities. However, it is important that members don't compromise their future ability to be able to take part in a full debate and decisions.
- 3.9 Dual-Hatted Members should also bear in mind that their position may change once they have voted for or against a particular decision at County. If for example, at the County meeting on 5 December, a Dual-Hatted Member voted in favour of pursuing a single unitary model then it is possible that they will be predetermined or have the appearance of being predetermined. This may affect their ability to participate at subsequent district level meetings. Dual-Hatted Members are also advised to seek advice from the County Council Monitoring Officer as to their position at County Council meetings and their dual-hatted status.

4. Conclusion

- 4.1 When considering taking part in council meetings to decide matters of local government reorganisation, all members should consider whether any of the above matters apply to them. Dual-Hatted Members will need to think particularly carefully – especially once they have voted in a particular way at County – but all members should be aware of the possible conduct issues.
- 4.2 The risk of taking part in a decision where there is a DPI, bias or predetermination is that the decision is challenged by way of Judicial Review. This would add disruption and cost to an already difficult and emotive reorganisation process. Members should consider the above issues and guidance on whether they should take part in meetings on this subject in order to ensure that sound decisions are made and reduce the likelihood of any challenges being brought.
- 4.3 The individual circumstances of each member will be unique. For example a member who is closely involved in proposals being put forward by one of their councils will be in a different situation to one who has no such close involvement. This note sets out the underlying legal principles to be taken into account but each member should

consult the Monitoring Officer if they have questions on their own particular circumstances.

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