

BABERGH DISTRICT COUNCIL

From: The Monitoring Officer	Report Number L83
To: Standards Committee	Date of Meeting: 21 October 2011

MEMBERS CODE OF CONDUCT CASE REPORTS

1. Purpose of Report / Main Issues

- 1.1 This report updates members on a recent decision of the High Court on bias and predetermination. Details are also provided on relevant decisions of the First-tier Tribunal (Local Government Standards in England) which considers Code of Conduct referrals and appeals from Standards Committee decisions. The report is produced for information and training purposes. None of the reported cases relate to members within the district of Babergh.

2. Recommendations

- 2.1 That the content of this report be noted.
- The Committee is able to resolve this matter.

3. Financial Implications

- 3.1 Not relevant to this report.

4. Risk Management and Legal Issues

- 4.1 This report seeks to provide Members of the Committee with current information on interpretation and application of the Code of Conduct to assist the Committee in its decision-making. The risk of misapplication of the Code is considered low, but impact could be critical.

5. Consultations

- 5.1 None

6. Equality and Diversity Impact

- 6.1 Not relevant to this report.

7. Key Information

High Court Decision

R (Berky) v. Newport City Council & others 2001

- 7.1 Judicial review proceedings were brought against the Council for a decision to grant planning permission for the construction of a supermarket contrary to the recommendation of the Planning Officer. The grounds of challenge included bias and predetermination by the Planning Committee. The claim was brought by a local resident who represented a single issue campaign group.

- 7.2 Part of the allegation of bias was that Cllr R (a member of the Committee) had been involved in the submission of a petition in support of the development because the petition bore a computer reference attributable to Cllr R. The Judge found that the explanation proffered by the Council was “rather unconvincing” but felt unable to make a firm finding of fact to lead to a conclusion of actual or apparent bias.
- 7.3 At the Planning Committee meeting itself Cllr R was recorded as saying “*I have to say (I am) proud to be associated with ward colleagues, democracy is in action here, thousands have signed the petition. (I) would remind officers you are here to serve the public. (The) Officer has not really nailed the true objection to (the) scheme, officers may (be) frightened of legal challenge if planning permission is granted....*”.
- 7.4 The Judge stated that the remark that officers “are here to serve the public” was not only unfair and ungracious, it was capable of creating the impression that the speaker was biased or that he had predetermined the matter. It was difficult to see why else Cllr R would criticise the author of a balanced, careful and comprehensive report in such immoderate terms. However, despite Cllr R’s “intemperate remark” it was reasonable to infer that it was so clearly misconceived that it could not have had an adverse impact upon the fairness of other members of the Committee. The resolution to grant planning permission had been carried by 8 votes to 1 and was upheld by the Court

Selected Appeal Decisions

Cllr H (Case No. LGS/2011/0544) – prejudicial interests/ time limits

- 7.5 District Councillor H lived opposite a property in respect of which a planning application had been made for the retention of boundary fencing. The application was referred to the Planning Committee under the Council’s Good Practice Guide because of Cllr H living in close proximity to the application site. The Planning Officer recommended approval of the application.
- 7.6 Cllr H and his wife submitted a letter of objection to the application. It was accepted that the letter was sent by Cllr H in his personal capacity. Cllr H sought advice from the Monitoring Officer on speaking at the Planning Committee and was advised that he had a prejudicial interest and it was open to him to make a written submission to the Committee. Cllr H liaised with other objectors and sent a detailed letter of objection to individual members of the Committee. This letter was sent by Cllr H as ward councillor. It was not copied to officers.
- 7.7 Cllr H appealed against the finding of the Standards Committee that the letter to Planning Committee members only, amounted to a breach of paragraph 12 (1)(c) of the Code of Conduct which provides that a member with a prejudicial interest must not seek improperly to influence a decision about the business in which the interest arises. Further, it was a technical breach in sending the letter to the Committee members only and not officers.
- 7.8 Cllr H also argued that the hearing before the Standards Committee was a nullity because it was conducted five and half months after the Monitoring Officer received the Investigator’s Report rather than within the 3 month prescribed period.

- 7.9 The Tribunal found that neither the content of the letter to the Planning Committee nor the failure to copy in officers amounted to a breach of the Code. That being the case it would be illogical to conclude that addressing a letter to the Committee was a breach. It was not possible to have a ‘technical breach’; it was either a breach or not, to be determined by an objective examination of the whole evidence. Evidence which is simply mitigation will only be relevant in determining the sanction rather than the presence of a breach.
- 7.10 Regarding the time limit, the Tribunal acknowledged that prior to the 2008 Regulations a failure to hold a hearing within 3 months of the Investigator’s report being completed would have resulted in the investigation being time barred. However, the 2008 Regulations stipulate that if the hearing is not held within 3 months, it should be held “as soon as reasonably practicable thereafter”. The Tribunal therefore concluded that consideration must be given to the failure to hold the hearing within the 3 months, the reasons for the delay and any other material factors in deciding the reasonableness of the hearing continuing. In the case of Cllr H there was nothing inherently unreasonable in the reasons for delay and the Standards Committee hearing had been valid.

Cllr N (Case No. LGS/2011/0546) – prejudicial interests

- 7.11 Parish councillor N appealed against the decision of the Standards Committee to suspend him for 3 months from participating in any planning issues.
- 7.12 Cllr N owned land on which his house and another property stand which has a common boundary with land for which a planning application for an extension had been submitted. Cllr N attended two meetings of the Parish Council at which the application was discussed without declaring an interest. He also attended a site visit. At the second meeting Cllr N proposed a successful motion to recommend rejection of the application. He maintained that he was simply supporting the Planning officer’s recommendation and not for personal motivation.
- 7.13 The Tribunal found that it was material that the local planning authority had failed to consult Cllr N as an adjacent landowner at the outset in accordance with usual practice. Had he been consulted then it would have been apparent to Cllr N that he was considered to have an interest in the application. The Tribunal did not accept that Cllr N had an interest in the application simply because of a common boundary with the development. Each case had to be decided on its merits and consideration given to how the councillor would be affected.
- 7.14 The test for a personal/prejudicial interest was whether a reasonable person, aware of the material facts and ignoring immaterial factors would consider the councillor had such an interest. In this particular instance, the development was more than 100 metres from Cllr N’s property and the likelihood of impact was remote. As such no interest arose.
- 7.15 The Tribunal did consider whether it should visit the location to assess the position first hand, but concluded that it would not be in the public interest to incur expenditure for a limited purpose.

8. Appendices / Background Documents

- R Berky) v Newport City Council & others 2011 EWHC 2100
- First-tier Tribunal (Local Government Standards in England) decisions listed in the report.

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