

PART 5E

**THE ROLE OF ELECTED MEMBERS
IN RELATION TO
LICENSING COMMITTEE HEARINGS
UNDER THE LICENSING ACT 2003**

1. Introduction

- 1.1 The Council's Licensing Committee comprises 15 elected Members and that committee has established sub-committees comprising any three of those elected Members. The sub committees meet to determine licence applications where there are objections and/or relevant representations. Should the applicant or those who have made representations/objections be dissatisfied with the decision of the Licensing Committee there is the right of appeal to the Magistrates Court.
- 1.2 Whilst all local authority actions are subject to the rules regarding probity, as embodied in the Council's Code of Conduct for Members, the Licensing Committee (like the Development Control Committee) will need to be especially diligent in this respect. In the "New Council Constitutions: Guidance Pack/Modular Constitutions for English Local Authorities" paragraph 13.08 states:

"Decision making by Council bodies acting as Tribunals

Many of the licensing and enforcement functions of ordinary Committees will entail them acting in a quasi judicial capacity the Council, a Councillor or an officer acting as a tribunal or in a quasi judicial manner will follow a proper procedure which accords with the requirements of natural justice and the right to a fair trial contained in Article 6 of the European Convention on Human Rights."

- 1.3 The Council's Code of Conduct for elected members sets out the rules regarding probity of councillors in Bristol City Council. This guidance does not replace the Code but is supplementary to it. It seeks to focus on the particular issues Licensing Committee Members may face in ensuring that they comply with the Code.

For example, a Member must not, in his official capacity, or any other circumstances, conduct himself in a manner which could reasonably be regarded as bringing his office or authority into disrepute (paragraph 4 of the Council's Code of Conduct). Members of the Licensing Committee must make many of their decisions in accordance with the rules of natural justice, which includes an obligation not to act with bias or where there is an appearance of bias (the test for appearance of bias being that there exists a "real possibility" of bias in the particular circumstances). A Member who accepted hospitality from an applicant for a licence to supply alcohol and/or provide regulated entertainment could well thereby give rise to an appearance that they are likely to be biased in favour of the applicant. This may be so even though the value of the hospitality is less than the £25 which would trigger an entry into the Authority's hospitality register. The quashing of a decision on the application on this basis could reasonably be regarded as bringing in the Councillor's office or the Authority into disrepute. Therefore,

whilst the receipt of hospitality under the value of £25 would not be declarable in the register under the terms of the Code, this guidance, which is approved by the Authority's Standards Committee, discourages the acceptance by Licensing Committee members of any gift or hospitality from applicants or others involved in applications under the Act by even where those gifts are of nominal value.

1.4 The guidance is primarily aimed at Members of the Licensing Committee itself, however various parts of it (such as the Section on Councillors as interested parties) are relevant to all Bristol City Councillors.

2. The Councillor as an "interested party"

2.1 Councillors should understand this guidance in the context of the decision making processes established under the Licensing Act 2003 and Councillors are reminded that a briefing note on the Act formed part of a report to Full Council on 10 February 2004. This can be viewed via the Council's web pages.

2.2 In particular, Councillors should be aware that under the Act only certain persons and bodies are given the right to make representations on applications etc. and those representations will only be relevant representations (and therefore capable of being considered) if they relate to the effect that granting the application for licence or variation etc. would have on the promotion of one or more of the four licensing objectives.

2.3 As far as individuals are concerned, only persons whose residence or business is in "the vicinity of" the premises concerned may make relevant representations and those representations must be made within a defined period.

2.4 The Licensing Authority has no discretion whatsoever to accept late representations or to receive representations from individuals who do not satisfy the residence or business criteria.

2.5 Whether or not a person meets the test of being in the vicinity of the premises concerned is a question of fact. In some Councils efforts have been made to define this by reference to a certain distance (for example 100 metres from the applicant site) whereas in Bristol the test of vicinity has been applied by reference to the potential for the individual concerned to be effected by the application and in particular where it appears that individual's rights under Article 8 of the European Convention on Human Rights (respect to private and family life) may be engaged.

2.6 There are therefore numerous applications in respect of which a Councillor would be entitled to make representations.

- 2.7 A Councillor wishing to establish if she would be entitled to make a representation in her own right can seek guidance from a member of the Licensing Act team at Princess House.
- 2.8 At the time of publication of this guidance, the Courts have not been called upon to rule on the issue of personal/prejudicial interests of Councillors who qualify as interested parties under the Act. It is reasonable to proceed on the basis that a Member who would be entitled to make representations might reasonably be regarded as being affected to a greater extent than other Council tax payers, rate payers or inhabitants of the Authority's area by a decision upon the application (cf. paragraph of the Council's code of conduct).
- 2.9 If a Member exercises a right to make representation then paragraph 10 of the Code of Conduct, which addresses the issue of when a personal interest is a prejudicial interest, should be considered as this action could be argued to give rise to an interest "which a member of the public with knowledge of the relevant facts would reasonably regard as so significant that it is likely to prejudice the Member's judgement of the public interest".
- 2.10 Whether a Member who was entitled to make representations in their own right but who did not do so would be judged as having a prejudicial interest in the matter is a difficult question, but, pending any case law which makes the law clear, Councillors who have a statutory right to make relevant representations should exercise caution and take great care not to conduct themselves in a manner which may subsequently be viewed as being in breach of the Code.
- 2.11 In this context, Members are reminded of the judgement of the Court in the case of Paul Richardson (2) Wendy Orm – v – (1) North Yorkshire County Council (2) The First Secretary of State and Brown and Potter Limited (interested party) (2003). In that case, Councillor Richardson was one of six householders likely to be effected by an application for planning permission to develop land near to premises which he owned. He made objections to the application. The Court found that he had a personal interest which was prejudicial by virtue of the proximity of his premises to the development. Accordingly he had to withdraw from the room or chamber where the meeting was held and he could not seek improperly to influence the decision about that matter. The Court ruled that he was not allowed to remain in order to read out a statement and made clear that the balance the legislature has struck in this regard is in favour of public confidence in the decision making process over and above the individual rights enjoyed by Councillors. Councillor Richardson could not remain at the meeting on his own behalf and nor could he remain as a representative of others in his ward.
- 2.12 It follows that:-
1. A Councillor with a personal interest must declare it;

2. Where that personal interest is a prejudicial interest the Councillor must not remain in the room when the matter is being considered at the meeting. Thus a Councillor with a prejudicial interest in a Licensing Act application, etc.:
 - (i) cannot serve on the Committee which is making the decision;
 - (ii) cannot attend the meeting sitting in the public gallery;
 - (iii) cannot act at the meeting as a representative of other interested parties;
 - (iv) cannot exercise the right non councillors would enjoy to participate in the hearing as a party with the right to address the Committee on equal terms with other parties.

This does not mean a Councillor cannot make relevant representations where s/he qualifies to be an interested party, but that Councillor's representations would either have to be received in writing or a representative could appear on his behalf.

Councillors who do not have a personal interest which is prejudicial can attend meetings where asked to be the representative of one of the parties, for example one of their constituents.

(it should be made clear that there are key differences in the new Gambling Act which although similar in process to the Licensing Act 2003 does provide for greater involvement in the decision making process.)

3. A Councillor with a personal interest which is not prejudicial, who attends a meeting of the Authority at which the matter is considered, must disclose to that meeting the existence and nature of that interest at the commencement of the consideration, or when the interest becomes apparent (paragraph 9(1) of the Council's Code of Conduct for Members). In the context of decision making to which the rules of natural justice apply, it is possible that a personal interest, even though not a prejudicial interest, could debar the Councillor in participating as a Member of a Committee or Sub-Committee on the basis that he could not act judicially (for example that his participation would give rise to an appearance of bias - this is more fully explained in paragraph 4 below); Committee Members are reminded that the Head of Legal Services and his team will provide advice on request in a particular case. In order to ensure that full details can be obtained and adequately considered and that the advice can be proffered in a timely manner, Councillors should, wherever possible, seek this guidance in advance of the meeting concerned.
4. Following the Richardson case, it is clear that even if a particular Member does not recognise that he has a personal interest which is prejudicial and which should prompt him to leave the room where the

matter is being considered, the Committee itself can require that Member to be excluded. The Committee may need to take this step in order to protect the integrity of the decision making process and to avoid the Council's decision being liable to be quashed. A Councillor asked to withdraw on this basis, having had a fair opportunity to make a contrary case, should comply with any request from the Committee that they leave the room and should do so in a dignified manner. Where the Member is an interested party the Committee should consider that Member's rights to be represented and how that can be facilitated.

5. A Councillor who is involved in an application as an interested party should take care not to abuse his position as an elected member to gain access to more information than would be available to an ordinary member of the public.

3. Constituents

- 3.1 Lobbying of Members by their constituents is legitimate as is the practice of a Member who does not have a prejudicial interest acting as the representative of a constituent at a hearing if requested to do so.
However if a member of the Licensing Committee is approached by persons wishing to persuade them to make a decision one way or another on a pending application then the Member should politely explain that they cannot discuss the issue as it may be construed as an unlawful pre determination of the matter. The person should be referred to the Licensing Officers who will provide suitable guidance in the circumstances of the particular case.
- 3.2 Where a Member, who is a serving member of the Licensing Committee, is asked to represent a constituent s/he can not act as both a representative and a decision maker.
- 3.3 In assisting their constituents, Members should take care not to pressurise officers of the Licensing Authority or any of the Responsible Authorities to exercise their professional judgement in a particular way and of course any conduct towards officers which amounts to bullying is entirely inappropriate. If Members have concerns they should raise them through appropriate channels, such as an individual's line manager or through the established scrutiny processes.

4. The appearance of bias

- 4.1 Decision making which may be described variously as being quasi judicial/being a hearing to which the rules of natural justice apply/being a decision to which Article 6 of the European Convention on Human Rights (the right to a fair trial) applies requires the decision maker to be able to

act judicially. This includes a requirement to act without actual bias or without the “appearance of bias”. It is obvious what constitutes actual bias.

- 4.2 The appearance of bias arises where a fair minded observer informed of the facts and having regard to circumstances of the particular case would conclude that there was a real possibility (sometimes referred to as “real danger”) of apparent bias effecting the Local Authority’s decision. This can appear in many guises and has been subject of much judicial consideration, sometimes concerning Judges and sometimes concerning other tribunals including some council committees determining applications. In the case of *Locabail (UK) Limited – v – Bayfield Properties Limited* [2000] QB451 Lord Bingham observed that it would be dangerous and futile to attempt to define or list the factors which may or may not give rise to this appearance of bias. He said (in the context of considering when Judges in court should recuse themselves – i.e. stand down):-

“Everything will depend on the facts, which may include the nature of the issue to be decided. We cannot, however, conceive of circumstances in which an objection could be soundly based on the religion, ethnic or national origin, gender, age, class, means or sexual orientation of the judge. Nor at any rate ordinarily, could an objection be soundly based on the judge’s social or educational or service or employment background or history, nor that of any member of the judge’s family; or previous political association; or Masonic association; or previous judicial decision; or extra curricular utterances (whether in text books, lectures, speeches, articles, interviews, reports or responses consultation papers); or previous receipt of instructions to act for or against any party, solicitor or advocate engaged in the case before him; or membership of the same inn, circuit, local law society or chambers... by contrast, a real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the case; or if the judge were closely acquainted with any member of the public involved in the case, particularly the credibility of that individual could be significant in the decision of the case; or if, in a case where the credibility of the individual were an issue to be decided by the judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such a person’s evidence with an open mind on any later occasion; or if, on any question at issue on the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind; or if, for any other reason, there were real grounds for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgement to bear on the issues before him. The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of the party or witness to be unreliable, would not without more found a sustainable objection. In most case, we think, the answer, one way or the other, will be obvious. If, in any case there is real ground for doubt, that doubt

should be resolved in favour of recusal. We repeat, every application must be decided on the facts and circumstances of the individual case. The greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be.”

4.3 In that context, Licensing Committee Members are guided as follows:-

(a) **Gifts**

Members should be very cautious about accepting gifts or hospitality. Paragraph 17 of the Council’s Code of Conduct for Members requires that Councillors, within 28 days of receiving any gift or hospitality over the value of £25, provide written notification to the Monitoring Officer of the existence and nature of that gift or hospitality.

It will readily be appreciated that gifts or hospitality from an applicant, even of a lower value than that which would trigger notification under paragraph 17, may give rise to the appearance of bias. The Standards Committee therefore considers that no gift or hospitality should be accepted by Members of the Licensing Committee where this may be connected to an application or other issue that body is likely to be required to consider and adjudicate upon.

(b) **“Dual Hatted” Members**

Under paragraph 10(2) of the Council’s Code of Conduct, Councillors who have a personal interest which is prejudicial have a discretion to regard themselves as not having a prejudicial interest in a matter if that matter relates to certain defined bodies or functions, for example if the matter relates to another relevant authority of which he is a member or another public authority in which he holds a position of general control or management or to which he has been appointed or nominated by the Council by its representatives.

In such situations the Member needs to disclose his/her interest but can participate in the decision making process. The Standards Board has previously commented that “... you should not sit on decision making bodies, such as Planning and Licensing Committees, when they decide applications from an Authority on which you also serve. Even though these situations fall within the scope of sub-paragraphs 10(2)(a) and (b) of the National Model Code of Conduct, a reasonable member of the public would think that your judgement was likely to be prejudiced. In addition, a legal challenge could be made against the Authority’s decision making process if you participate in these circumstances,” (“lobby groups, dual hatted members and the Code of Conduct – Guidance for Members”, Standards Board for England September 2004 page 15).

The Standards Board has also stated “regulatory matters such as planning and licensing, are particularly sensitive... in our view you should adopt a particularly cautious approach to planning and licensing matters “(Ibid, page 6).

The Standards Committee does not consider that Members should exercise discretion to disregard a prejudicial interest where they are “dual hatted”; in order to ensure the integrity of the decision making process as a whole the Committee considers the Member should excuse themselves from sitting on a Committee convened to determine that matter.

(c) Personal interests which are not prejudicial

A Councillor who has a personal interest which is not prejudicial need usually only declare that interest and is not required to withdraw from the room where the matter is under consideration or indeed to stand down from taking part in the decision making process. However, it will be appreciated from the words of Lord Bingham quoted above, that some personal interests, whilst not prejudicial under the Code, can give rise to a real possibility of bias and as such the affected Member should not participate in making a decision on that matter.

(d) Site visits

It is considered that the need for site visits will only occasionally arise. It is conceivable that a site visit which is not conducted in accordance with published and fair rules and procedures could prompt allegations of pre-determination/bias on the part of the decision maker. The Standards Committee therefore recommends that, on those rare occasions where a site visit is judged necessary, the procedure governing the conduct of the site visit be published with notice of the hearing. If it appears site visits may be regularly required then, when it next reviews its licensing procedure rules, the Licensing Committee should put in place a specific procedure for the conduct of site visits which is transparent, so as to ensure the maintenance of the independence and impartiality of the Members who will be deciding the matter under consideration.

(e) Conduct at Meetings

Members of the Licensing Committee or its sub-committees who are considering applications which may effect an individual’s livelihood and/or the private and family life of residents etc. should take special care to ensure not only that justice is done but that it is seen to be done. To this end Councillors should conduct themselves at all times in an appropriate manner. They must remain alert and focussed on the business of the meeting and, importantly, they must appear to be alert and focussed on the business of the meeting during hearings. Councillors should not sleep, or appear to be asleep,

consume food or drink, use telephones or allow other interruptions to the business in hand.

Councillors should not be over familiar with officers and other individuals who regularly appear before the Committee. Whilst the hearings are to be conducted as a discussion rather than as a formal debate, this does not lessen the importance of the role of the Chair in providing a firm steer. On the contrary, the role of the Chair in leading the discussion that is required under the Regulations is extremely important and Councillors should, like the parties to the meeting, be led in the discussion by the Committee Chair so that the discussion remains focussed on relevant issues and proceeds in an orderly fashion with all relevant points being explored fully around the table.

The Chair and his/her colleagues must under no circumstances engage in unwarranted joviality or make comments and asides which are not directly relevant to the matter under consideration. It may be considered that such conduct will serve to put applicants and members of the public at their ease, but there is always a risk that the opposite effect will be produced and that the Applicant and other parties will feel that they are not being taken seriously. The Chair should therefore aim to foster a relaxed but nonetheless businesslike atmosphere in the hearing.

Whilst it is permissible for Members to make clear that they have relevant local knowledge (for example, the Chair may say “we all know the premises and their vicinity very well”) it is not appropriate for Members to engage in personal anecdotes which are not directly relevant to the business before the meeting; members should focus on their duty to have regard to the representations made by other persons and bodies and to consider guidance and policy. It is unlikely anecdotes will have any relevance to the business of the meeting and recounting them can give the appearance that the Committee is not taking the matter as seriously as the parties expect them to, or that the member is predisposed towards the interests of one party over another in advance of hearing from them all.

(f) Use of Party Whip

The Council’s Statement of Licensing Policy makes plain that there should be no party whip in respect of any quasi judicial business of the Licensing Committee and its sub-committees. It is recommended that this fact be recorded at the outset of every hearing as a matter of course.

5. Participation of Ward Members in Sub-Committees which are convened to consider applications in the Member’s own Ward

5.1 All Councillors are required to act in the public interest and this will prevail over the interests of individual constituents in their Ward. Therefore a well informed observer would not consider that there was a real possibility of bias arising when Ward Members are participants in a Committee making

decisions in respect of premises or individuals in their Ward. However, the volume of applications and the number of potential parties appearing before Committee Members is such that there is a higher risk in this area of the Council's work of a Member inadvertently serving on a Committee when they should have stepped down for example because they have provided assistance to one of the parties at an earlier stage. For this reason the Standards Committee considers that it would be good administrative practice in the context of this legislation to generally select Members to serve on Committees which will be dealing with matters in other areas of the City.