

## **Part 5 – Codes and Protocols**

### **Section 6 - Protocol on Good Practice in Licensing for Members and Officers Dealing with Licensing Issues**

#### **1.0 INTRODUCTION**

- 1.1 The Licensing Act 2003 and the Gambling Act 2005 have put local authorities firmly in the centre of decision making upon licences for regulated entertainment, the provision of alcohol, late night refreshment and the Licensing of Gambling Establishments and Small Lotteries.
- 1.2 This Protocol aims at enabling councillors to represent their constituents, whether they be residents, local businesses etc. should they wish to, by acting as an 'interested parties' at licence hearings, without opening up the local authority to accusations of pre-determination, bias or maladministration.
- 1.3 As regards the Licensing Committee, the role of the Elected Member as part of that Committee will involve balancing the multiple needs and interests of the local community, whilst prioritising the four Licensing Objectives of the Licensing Act 2003 (ie prevention of crime and disorder; public safety; prevention of public nuisance; and protection of children from harm) and the three Objectives of the Gambling Act 2005 (ie preventing gambling from being a source of crime or disorder, being associated with crime or disorder or being used to support crime; ensuring that gambling is conducted in a fair and open way; and protecting children and other vulnerable persons from being harmed or exploited by gambling). In doing so the Elected Member must maintain his/her impartiality and, as public perception of probity is critical, his/her appearance of impartiality too, during the decision making process. This protocol is intended to ensure that this is achieved.
- 1.4 This protocol is part of the Council's constitution and all members and officers are expected to comply strictly with its provisions. Any breach of the protocol will be referred to the Standards Committee, unless it is also a breach of the Local Code of Conduct for Members in which case the matter will be referred to the Standards Board.
- 1.5 This protocol is in addition to and takes account of the ethical framework introduced by the Local Government Act 2000.
- 1.6 This protocol can be changed at any time by resolution of Council.

#### **2.0 GENERAL ROLE AND CONDUCT OF COUNCILLORS AND OFFICERS**

- 2.1 Councillors and officers have different but complimentary roles. Both serve the public but councillors are responsible to the electorate, whilst officers are responsible to the Council as a whole. The Council's reputation as a successful licensing authority can only be based upon a mutual trust between councillors and officers and an understanding of each others positions. This relationship, and the trust which it underpins must never be abused or compromised.
- 2.2 Legislation emphasises the overriding requirement that the public are entitled to expect the highest standards of conduct and probity by all persons holding public office and in particular that when dealing with licensing matters only issues relating to the licensing objectives are taken into account and when dealing with gambling matters only issues relating to the three gambling objectives are taken into account. There are statutory provisions and codes setting standards which must be followed if the public perception of the integrity of public service is to be maintained and improved.
- 2.3 Members must comply with the provisions of the Local Code of Conduct which has been adopted by the Council which sets out the requirements on councillors in relation to their conduct. The Code not only covers issues central to the preservation of an ethical approach to council business but also appropriate relationships with other members, staff and the public which will impact on the

way in which members participate in the licensing process. Of particular relevance to councillors serving on the Licensing Committee and Panels is the requirement that a member:

“must not in his official capacity, or any other circumstances, use his position as a member improperly to confer on or secure for himself or any other person, an advantage or disadvantage”.

2.4 Officers involved in the processing and determination of licensing matters must act in accordance with the Local Code of Conduct for council employees.

2.5 Despite the provisions of the Local Code of Conduct members and officers involved in licensing matters should not accept gifts or hospitality. If, however, a degree of hospitality is unavoidable it should be ensured that this is of a minimum and its receipt is declared as soon as possible. Members and officers should notify the Monitoring Officer of such hospitality. In all cases details must be entered in the Register of Gifts and Hospitality.

2.6 Officers must always act impartially.

2.7 The Council is committed to a culture of continuous improvement in all of its services and will ensure that officers and members involved in the licensing process receive proper training/development to ensure that they are able to undertake their respective roles.

2.8 Members will be required to attend initial training/development sessions when first serving on the Licensing Committee (normally within three months of appointment). Refresher training will be offered to members every year, and members will be required to attend refresher training every two years. Members who do not participate in training will be excluded from serving on Licensing Panels determining licensing applications and other matters.

### 3.0 **REGISTRATION AND DECLARATION OF INTERESTS**

3.1 Members and officers undertaking the Council's licensing functions have a duty to act fairly and without bias at all times and to be seen to be so doing. All steps should therefore be taken to ensure that their actions do not infer impropriety of any sort.

3.2 The Local Government Act 2000 and the Local Code of Conduct place requirements on members about the registration and declaration of their interests and the consequences for the member's participation in the consideration of an issue, in the light of those interests. These requirements must be followed scrupulously and members should review their situation regularly. Guidance on the registration and declaration of interest may be sought from the Council's Monitoring Officer, although ultimate responsibility for fulfilling the requirements rests individually with each member.

3.3 A Register of Members' Interests will be maintained by the Monitoring Officer and will be available for public inspection. A member must provide the Monitoring Officer with written details of relevant interests within 28 days of election or appointment to office. Any changes to those interests must be similarly notified within 28 days of the member becoming aware of such changes.

3.4 The Local Code of Conduct requires a member to declare the interest and the nature of it and the member may, unless the interest is a prejudicial interest, participate in the discussion and voting on the matter.

3.5 A personal interest is defined as:

1. Any matter relating to an interest in respect of which the member has given notice in the Statutory Register of Members' Interests; and
2. Any matter upon which a decision upon it might reasonably be regarded as affecting to a greater extent than other council tax payers, ratepayers or inhabitants of the authority's area, the wellbeing or financial position of themselves, a relative or friend, or
  - any employment or business carried on by such persons;

- any person who employs or has appointed such persons, any firm in which they are a partner, or any company of which they are directors;
- any corporate body in which such persons have a beneficial interest in a class of securities exceeding the nominal value of £5000; or
- any body which the member is required to register in the Statutory Register of Interests in which such persons hold a position of general control or management.

3.6 Where a member has a personal interest the member then needs to consider whether the personal interest is a prejudicial one. The Code provides that a personal interest becomes a prejudicial one

“.....if the interest is one 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”.

If a member has such an interest, he/she must not participate in a discussion on the matter and must withdraw from the room and not seek improperly to influence a decision in the matter. Similarly, a non-committee member who has a prejudicial interest in a licensing matter must not sit in the public gallery whilst the matter is being considered so as not to influence the decision and should not lobby other members on the matter.

3.7 Where a matter under discussion relates to one of the following, subject to paragraph 3.9 below, the Code of Conduct provides that the interest may not be regarded as prejudicial and, whilst a member would need to declare the interest and the nature of it, he/she could still participate in the meeting:

- another authority of which the councillor is a member
- another public authority in which the councillor has a position of general management or control
- a body to which the councillor has been appointed or nominated as a representative of the authority.

3.8 In such situations the member needs to disclose his/her interest but under the Code of Conduct could participate in the decision-making process. It should be noted however, that this assumes that the Member has NOT formed a view of his/her decision prior to the decision-making processes and regard must be had to the following paragraph.

3.9 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 judgment is 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.”

#### 4.0 LICENSING SUB-COMMITTEES – BIAS AND PREDETERMINATION

##### 4.1 Introduction

4.1.1 Bias has been defined as “an attitude of mind which prevents the decision-maker from making an objective determination of the issues that he has to resolve”. The important concept as regards bias is that there is no need for proof of actual or potential bias for there to be ‘procedural impropriety’ shown. It is sufficient that there is an appearance of bias. Accordingly, the test for bias is ‘whether a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility of bias’.

4.1.2 Further, where the decision to be made is quasi-judicial, as at Licensing Panels, the key issue to ensure the legality of the decision is the “public perception of a probability of unconscious bias”.

This brings into consideration the previous dealings of members of the Licensing Panel and views expressed by them. Members should therefore avoid participating as a member of a Licensing Panel where previous voting or statements of belief may alter that “objective impression conveyed”. The Standards Board for England’s advice also states “You should not reach a final conclusion before you come to take a decision on an issue” and that “Your statements and activities should not create the impression your views on a matter are fixed, and that you will not fairly consider the evidence or arguments presented to you when you are making a decision”.

4.1.3 ‘Bias’ also includes the situation where it is felt that the decision-maker has pre-determined the case upon his/her own prejudices. In the local government context, the most obvious example of pre-determination is where the impression is clearly given to persons (such as members of the public or a lobbyist) beyond conveying a mere pre-disposition, that ‘the member or authority will approach the matter with a closed mind and without impartial consideration of all relevant issues.

4.1.4 To help avoid accusations of pre-determination and ensure that Ward Members are free to represent their constituents as ‘interested parties’, Ward Members will not sit on Licensing Panels where that Panel is considering an application in that member’s ward.

#### 4.2 **Difference between the Personal/Prejudicial Interests provisions of the Code of Conduct, and Bias at Common Law**

4.2.1 Bias at common law and personal and prejudicial interests under the National Model Code of Conduct are related but do differ as concepts and in their effect. Although the wording and apparent objectives are similar, the test for common law bias has a lower threshold. Bias at common law includes those areas where the potential Licensing Panel member has created a real danger of a perception that s/he has prevented him or herself from being able to make an impartial determination of the issues. This is also known as fettering one’s discretion. Interests under the Code of Conduct, however, only concern themselves with the definition of a personal interest under the Code of Conduct, first, and only then is the test as to whether or not that personal interest may be prejudicial then applied.

4.2.2 In terms of effects, a member who has a personal and prejudicial interest may not take part in the Licensing Panel or attend the hearing at all. Whereas, a member who has fettered his/her discretion through common-law bias may not sit as part of the Licensing Panel but may act on behalf of (or as) an ‘interested party’.

#### 5.0 **APPLICATIONS SUBMITTED BY THE LOCAL AUTHORITY**

5.1 The Council could apply for their own Premises Licences. Such applications must be, and seen to be, dealt with fairly. During such an application process it is therefore important to be aware of any potential appearance of bias.

#### 6.0 **LOBBYING OF/BY COUNCILLORS**

6.1 Local democracy: The Licensing Act 2003 and The Gambling Act 2005 set out the grounds for making representations on licence applications and limits the parties which may make such representations. It should be borne in mind that one of the key aims of the Licensing Act 2003 and the Gambling Act 2005 is to localise decision making or ‘democratise’ the process and members are therefore legitimately concerned with their locality and the needs/wishes of its constituents, including both the needs for entertainment and employment, as well as the undesirability of crime and public nuisance. Local councillors can either sit as part of the Licensing Committee/Panel or can represent the interests of their constituents by acting as ‘interested parties’, as long as they do not have any prejudicial interest in the matter.

6.2 The Code of Conduct: Membership of lobby/campaign groups should be included on the register of interests and then if the matter to be decided at a licensing hearing relates to the member’s membership of a lobby or campaign group, a personal (and potentially, a prejudicial) interest should be declared. This might, for example, include a situation where the member is part of a campaign group which promotes rural pubs and the licence application requests a licence for such

a premises. Whilst the Code of Conduct does not require the member to withdraw from the meeting unless there is also a prejudicial interest, so as to avoid perceptions of bias in such a situation the member shall not sit on the Panel determining the application. However, this would not preclude the member attending the meeting either as the licence applicant, or being/representing an 'interested party'.

- 6.3 Clearly, if the interest is also a prejudicial one then the member must not be present in the meeting in any form. Should s/he be the licence applicant or be/represent an 'interested party' then an agent should be utilised at the meeting instead, to present the member's views.
- 6.4 It should be noted that the Standards Board for England has advised that "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".
- 6.5 Appearance of bias: Whilst lobbying of members is legitimate and certain members may make representations to the Licensing Committee/Panel on behalf of 'interested parties', it is crucial for the Licensing Authority and its Committee/Panel to ensure that there is neither actual nor an appearance of bias in its decision making.
- 6.6 To avoid an appearance of bias:
- No member sitting on the Licensing Panel can represent one of the interested parties or the applicant. If s/he wishes to do so s/he must excuse him/herself from membership of the Panel which is considering the application and address the Panel as an 'interested party' or as the applicant's representative/witness.
  - If a member who sits on the Licensing Panel is approached by persons wishing to lobby him/her as regards the licence application then that member must politely explain that they cannot discuss the matter and refer the lobbyist to his/her Ward Member or the Licensing Officer who can explain the process of decision making. If the member who sits on the Licensing Panel wishes to represent them then s/he will need to excuse him/herself from the Licensing Panel.
  - Members who are part of the Licensing Panel must avoid expressing personal opinions prior to Licensing Panel's decision. To do so will indicate that the member has made up his/her mind before hearing all the evidence and that their decision may not be based upon the Licensing Objectives nor the Licensing Authority's Statement of Licensing under the Licensing Act 2003 or Statement of Principles under the Gaming Act 2005.
  - Political group meetings should never be used to decide how any members on the Licensing Sub Committee should vote. The view of the Ombudsman is that using political whips in this manner may well amount to findings of maladministration.
  - Councillors must not be members of the Licensing Committee/Panel if they are involved in campaigning on the particular application.
  - Other members (ie those which do not sit on the Licensing Sub Committee) need to be careful when discussing issues relating to matters which may come before the Licensing Panel members as this can easily be viewed as bias/pressure and may well open that Panel member to accusations of such.
  - Members must not pressurise Licensing Officers to make any particular decisions or recommendations as regards applications (such as the ability to decide whether a representation is frivolous or vexatious).
- 6.7 It should be noted that a member for a ward, which would be directly affected by the application, is most at risk to being accused of bias. Such members are also most likely to be put under pressure to represent local 'interested parties' (ie objectors/supporters) or indeed 'responsible authorities' as regards a licence application. It is for this reason that, whilst there are no statutory requirements

for ward members to excuse themselves from such licence application Panels (unless they have a prejudicial interest), members whose ward includes the application, or whose ward is likely to be affected by the application, will not sit on the Licensing Panel considering the application but s/he may wish to act as/or represent an 'interested party'.

## **7.0 PRE-APPLICATION/PRE-DECISION DISCUSSIONS**

7.1 Discussions between the licence applicant and the Licensing Authority prior to the submission of an application (or prior to a decision being made) are often helpful to both parties. For example, a premises licence applicant may ask for advice on how to complete an 'operating schedule'. However, these discussions can often be viewed by objectors as a form of lobbying' and the Authority must ensure it is not open to accusations or/appearance of bias. Accordingly Licensing Panel members should ensure that they do NOT take part in any pre-application/pre-decision discussions and that applicants are referred to the Licensing Officer.

## **8.0 ROLE OF THE LICENSING OFFICER**

8.1 Licensing Officers have no ability under the Licensing Act 2003 nor the Gambling Act 2005 to make representations or to be a party to the hearing. There is no legal provision for Licensing Officers to make recommendations to the Licensing Panel in terms of the outcome of the Committee hearing as is seen in planning cases. However, a summary report of the application, the representations, and the Officer's comments as to how these relate to the Licensing Act 2003, the Gambling Act 2005 and the Guidance and the local Licensing Policy Statement and/or Gambling Statement of Principles, may be provided.

## **9.0 DECISION MAKING**

9.1 Reasons for decisions made must be clearly documented so that any subsequent accusations of bias etc can be defended. It is critical that it is clear that decisions are made according to the Licensing Objectives of the Licensing Act 2003 and The Gambling Act 2005 as well as the Licensing Authority's Licensing Policy Statement and Gambling Statement of Principles. Whilst the Government's Guidance accompanying the Licensing Act 2003 indicates some other factors which may influence decisions (eg live music/cultural considerations) these will always be subservient to the Licensing Objectives and the Licensing Policy Statement and Statement of Principles.

## **10.0 SITE VISITS**

10.1 Site visits by Licensing Sub Committee members are generally unnecessary and can put the members and the Licensing Authority at risk of accusations of bias. A decision to undertake a site visit must set out the justifiable reasons and clear guidance as to how the site visit will be conducted.