

BIAS IN DECISION MAKING – HOW TO RECOGNISE AND AVOID IT

A SIMPLE GUIDE FOR COUNCILS IN OXFORDSHIRE

1. Local authorities must act within the law. The law provides that decisions which are **tainted by bias** may be quashed by the courts. Successful challenges to the legality of a decision are costly and time consuming. The purpose of this guide is to help councillors identify the issue and to provide advice as to how to respond to it.
2. If, as a councillor, you have a **disclosable pecuniary interest (DPI)** in a matter being discussed at a meeting, then this will be **presumed bias** and you should declare your interest and withdraw from the meeting room. You should **not** use your public office to seek information or to influence in any way a matter in which you have a DPI. As well as vitiating the decision, you may be committing a criminal offence which is punishable by a fine or imprisonment and which may also result in you being disqualified from office.
3. A more difficult area is that of **apparent bias**. This is where you do not have a DPI in a particular matter, but have other interest you have in the matter, or your actions in relation to it, make your participation in the decision untenable.

The question that a court would ask itself is: whether a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the decision maker was biased. In the local government context, the decision maker might be a single councillor but is more likely to be a number of councillors meeting as a committee, cabinet or as the entire council. It may only require one councillor to be biased for the decision to be vitiated, even if the majority on the decision making body are not. This rule applies to any decision of an council, regardless of its nature.

4. The test that the court applies is an objective one: what would the fair minded and informed observer think of it? Not: do you think you are biased (which would be a subjective test). The hypothetical fair minded observer is assumed to be a reasonable member of the public who is neither complacent, nor unduly sensitive or suspicious. There are a couple of scenarios which are particularly likely to raise issues of apparent bias.
5. The first scenario concerns predetermination. This is where things you do or say in advance of, or at, a meeting suggest that your mind is completely made up regardless of any information available to you when the decision is actually made. The law says that you must keep an open mind but the law also recognises that you may hold and express strong views, just so long as your

mind is not completely closed on an issue. Of course, one never knows the mind of another, so this scenario only ever arises when a councillor has chosen to be outspoken on an issue.

Generally speaking, it is advisable to avoid being outspoken on regulatory issues where individual rights or interests are being determined.

6. The second scenario concerns conflicts of interest. This is where other personal interests that you have (which do not qualify as DPIs) e.g. being a trustee of a charity or sitting on the management body of a local body or living in close proximity to a planning application site or being related to an applicant for a permission or licence, might be perceived as preventing you from giving objective consideration to an issue. Whilst such interests would not normally prevent you from participating in a decision, there may be situations where the matter being discussed is so significant for, and closely connected with, the interests of the other body that a fair minded and informed observer would think there to be a real possibility of bias. This is an area where seeking advice is particularly important.
7. In both of these scenarios, if you consider that there may be apparent bias then you should not participate in the decision and it is advisable to leave the meeting room for that item. Whilst there is no requirement to declare your 'interest' (as you must do for DPIs), you may wish to do so in order to signal clearly your non-participation and withdrawal.
8. If you are in any doubt about these scenarios or any others then you should always seek the advice of your monitoring Officer (for principal councils) or clerk (for parish councils). This guide has been produced by the monitoring officers of the Oxfordshire authorities in consultation with the Oxfordshire Association of Local Councils and we hope that councillors find it helpful.

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