

FOR LOCAL AUTHORITIES IN ENGLAND

February 2005

Note:

- Hard copy of this Guidance is available from LACORS either via a download from its website (free for local authority users) or a copy can be ordered from LACORS, telephone 020 7840 7200 (a charge will be made).
- A separate LACORS' leaflet for Elected Members which summarises the practical suggestions contained within this document, will shortly be available via LACORS' website.

In offering this advice LACORS wishes to make it clear that:

- *Legislation may change over time and the advice given is based on the information available at the time the guidance was produced. It is not necessarily comprehensive and is subject to revision in the light of further information.*
- *Only the courts can interpret statutory legislation with any authority.*
- *This advice is not intended to be a definitive guide to, nor substitute for, the relevant law. Independent legal advice should be sought where appropriate.*

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FOREWORD

The Licensing Act 2003 will put local authorities firmly in the centre of decision making upon licences for regulated entertainment and the provision of alcohol, as well as late night refreshment. Concerns regarding this shift in responsibility have centred around doubts surrounding the impartiality of Councillors and especially as regards those who will make-up the Licensing Committee that will decide upon applications. This concern arises from a view that Councillors are subject to local political pressures and a belief that they will regard the views of local residents as taking precedence over the other interests of their communities.

More broadly, public attention has focused upon the probity of politicians, at both the local and national level, particularly since the outcomes of the Nolan Committee's Third Report in 1997 on the Standards in Public Life. This report resulted in the Local Government Act 2000 which includes a Model Code of Conduct for Councillors and also took account of the Human Rights Act 1998.

This guidance therefore aims at enabling local 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.

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. 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 guidance is intended to assist local authorities ensure their Elected Members achieve this.

The guidance within is written with *all* Elected Members in mind, whether they sit on a Licensing Committee or not. It is intended to assist local authorities to devise / review and update local guidance to take account of the new licensing duties, as well as perhaps informing training provided for Councillors. Local Authorities may wish to present this guidance to both their Licensing Committee and their Standards Committee to promote discussion and agreement on local procedure.

Licensing Committee rules will need to set-out procedures for representations, evidence and decision-making and LACORS' Committee Guidance will be available shortly.

In issuing this guidance, LACORS is aware that on 15th January 2004 The Committee on Standards in Public Life launched its 10th inquiry, entitled "Getting the Balance Right:

Implementing Standards of Conduct in Public Life". The aim of this is to "consider the processes for maintaining high standards of conduct in public bodies, local government, and the National Health Service". One of the key foci of the Committee is "The management and enforcement of Codes of Conduct including declarations of interest."¹ LACORS therefore awaits the outcomes of this report due shortly.

A number of local authority officers have assisted LACORS with this guidance and special thanks is offered to Philip McCourt, Head of Legal Services and Monitoring Officer at Harborough. Pauline Powell, Senior Solicitor at Bristol and Peter Large, at Westminster City Council have also provided helpful comments and advice. LACORS' Licensing Policy Forum members have also proved, as always, extremely helpful, reviewing drafts and providing endorsement for the work that LACORS has undertaken in producing this guidance. The Association of Council Secretaries and Solicitors (ACSeS), The Association of London Government (ALG), and the Society of Local Authority Chief Executives (SOLACE) have also been consulted and the Standards Board for England has been particularly helpful.

Finally, this version of the guidance is intended for local authorities in England; whilst much of this document is relevant for local authorities in Wales, a Welsh form of the guidance will shortly follow which will take account of the Welsh Model Code.

Cllr Geoffrey Theobald OBE
Chairman
LACORS

¹ The Chair, Sir Nigel Wicks, stated *"We want to see whether the arrangements in public bodies, local government and the National Health Service, most of which have been created over the last ten years or so as a result of recommendations of this Committee, are proportionate to the outcomes we want to achieve and are not over-bureaucratic, disproportionate or act as a disincentive to public service."*

A) INTRODUCTION

1. The Licensing Act 2003

The Licensing Act 2003 was approved by Parliament on 10th July 2003. As a result, local authorities, in the form of 'Licensing Authorities', will take on the increased responsibilities of licensing premises and persons with regard to the carrying-out of licensable activities including the sale and supply of alcohol; provision of regulated entertainment; and the provision of late night refreshment. Key to the process of deciding licence applications will be each Licensing Authority's Licensing Committee.

Each Licensing Committee will be made-up of between 10-15 Elected Members and will be able to form sub-committees of no more than 3 Elected Members, to decide upon 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 then the right of appeal to the Magistrates' Court.

Whilst all local authority actions are subject to rules regarding probity, these Licensing Committees (like the existing Local Authority Planning Committees) will need to be especially diligent in this respect. The DETR (now ODPM) "New council constitutions: guidance pack / Modular constitutions for English local authorities" states:

This guidance set-outs the general rules regarding probity in local government and considers how these will apply specifically to the Licensing Committee functions under the Licensing Act 2003.

2. Probity in local government

The following information is well known in local government, however, it is intended to serve as a useful background summary.

There are a number of sources of rules regarding probity in local government:

- The Local Government Act 2000 (primary and secondary legislation)
- Rules of Natural Justice (case law)
- The Human Rights Act 1998 (primary legislation and case law)

The Local Government Act 2000

As a result of general concern regarding probity in central government, The Committee on Standards in Public Life was set up in October 1994, under the Chairmanship of Lord Nolan. The Committee's remit was to consider the standards of conduct in various areas of public life and to make subsequent recommendations. The Committee's first report focused upon MPs, Ministers and Civil Servants, Executive Quangos and NHS bodies; its second report looked at local public spending bodies; and the Third Report of the Committee considered conduct in local government (in England, Scotland and Wales).

The Third Report's recommendations resulted in a Government Green Paper "Modernising Local Government: A new Ethical Framework" published in April 1998; a White Paper "Modern Local Government, in Touch with the People" (Cm4014) in July 1998; draft legislation in the form of a document "Local Leadership, Local Choice" (Cm1298); and finally the Local Government Act which received Royal Assent in July 2000.

The Local Government Act 2000 resulted in a number of new statutory requirements, the detail of which was set-out in Statutory Instruments:

- i. Principles
- ii. Model Code of Conduct
- iii. Standards Committees
- iv. Standards Board

These were all designed to help Local Authorities avoid allegations of malpractice / maladministration etc. Further detail is provided on these items below.

(i) Principles

The Principles of Public Life are:

Selflessness - Members should serve only the public interest and should never improperly confer an advantage or disadvantage on any person.

Honesty and Integrity - Members should not place themselves in situations where their honesty and integrity may be questioned, should not behave improperly and should on all occasions avoid the appearance of such behaviour.

Objectivity - Members should make decisions on merit, including when making appointments, awarding contracts, or recommending individuals for rewards or benefits.

Accountability - Members should be accountable to the public for their actions and the manner in which they carry out their responsibilities, and should co-operate fully and honestly with any scrutiny appropriate to their particular office.

Openness - Members should be as open as possible about their actions and those of their authority, and should be prepared to give reasons for those actions.

Personal Judgement - Members may take account of the views of others, including their political group, but should reach their own conclusions on the issues before them and act in accordance with those conclusions.

Respect for Others - Members should promote equality by not discriminating unlawfully against any person, and by treating people with respect, regardless of their race, age, religion, gender, sexual orientation or disability. They should respect the impartiality and integrity of the authority's statutory officers, and its other employees.

Duty to Uphold the Law - Members should uphold the law and, on all occasions, act in accordance with the trust that the public is entitled to place in them.

Stewardship - Members should do whatever they are able to do to ensure that their authorities use their resources prudently and in accordance with the law.

Leadership - Members should promote and support these principles by leadership, and by example, and should act in a way that secures or preserves public confidence.

(ii) National Model Code of Conduct

The National Model Code of Conduct was established by Statutory Instrument 2001 No. 1401 "The Relevant Authorities (General Principles) Order 2001" on 5th Nov 2001. As a result, every Local Authority was required to adopt a Code of Conduct by May 2002, to govern the behaviour of its Elected Members and Officers. If no 'local' code were produced then the National Model Code of Conduct was deemed to apply.

Local Authorities are empowered to add to the provisions in the National Model Code of Conduct (which are consistent with the National Model Code of Conduct) but the Standards Board advised against doing this, at least initially. It should also be noted that all Local Codes of Conduct are supplemented by Guidance from the Standards Board.

Elected Members were required to sign-up to the relevant Local Authority Code of Conduct within 2 months of the Code's adoption.

The National Model Code of Conduct sets-out rules and guidelines for Member's behaviour, including items on registration of interests, etc. This guidance will look at how the Code may be related to the Licensing Committee context. It is relevant to note the Standards Board guidance that *"Your Council may develop specific guidance building on the rules in the local code e.g. the way members should treat confidential information or how they deal with planning issues. However, any such guidance should not be considered as part of the local code, but as guidance on how to comply with it."* ("Guidance to Part III of the Local Government Act 2000 Local Authorities" Standards Board:

http://www.standardsboard.co.uk/pdfs/guidance/Guide_Local_Authorities.pdf)

It should also be noted that the National Model Code of Conduct is likely to be soon reviewed by the Standards Board for England; a process which began at the Third Assembly of Standards Committees in September 2004. Its application in terms of the Licensing Act 2003 may effect aspects of this review and comments to LACORS would be welcomed in this regard.

(iii) Standards Committees

Under the Local Government Act 2000 every Local Authority is required to set-up a local Standards Committee. These are responsible for promoting and maintaining high standards of conduct by Members and co-opted Members of the authority, and to assist members and co-opted Members to observe the Local Authority's Code of Conduct. The Committee should advise Members of any changes to the Code of Conduct; monitor the operation of the Code; and advise and train Members on matters relating to the Code of Conduct. The Standards Committees can also carry-out other functions as the Local Authority sees fit. The Standards Board in England (and the Ombudsman in Wales) may also issue guidance as to the exercise of functions by the Standards Committees.

(iv) The Standards Board for England

The Standards Board for England was formally established in March 2001, and is intended to be independent of government. The Board's aim is to ensure that standards of ethical conduct are being maintained by local authorities and it deals with any complaints of misconduct against individual members.

Further information about the Standards Board can be found at:

<http://www.standardsboard.gov.uk/>

Guidance from the Standards Board can be found at:
<http://www.standardsboard.co.uk/pdfs/guidance/>

3. Natural Justice - rules of the English Common Law

It should be noted that the following information has been provided to set out the concepts involved in discussion of 'natural justice' and that the case law is primarily provided so as to demonstrate these concepts. Consideration of how these affect local authority functions under the Licensing Act 2003 specifically is provided in subsequent sections of this document.

Some debate exists as to whether Licensing Committees under the Licensing Act 2003 are 'administrative' or 'quasi-judicial' bodies. It may be worth quoting one constitutional lawyer's words on the topic of 'judicial', 'quasi-judicial' and 'administrative' functions: the distinction:

The reason the distinction between 'judicial' and 'administrative' was important was that stricter rules of natural justice were required for the former and thus the decisions of public bodies which were viewed as being 'judicial' and not 'administrative' were more open to judicial review by the courts. It was thus in the interests of public bodies that a greater number of its decisions were viewed as being 'administrative'. However, since *Ridge v Baldwin (1964) AC 40* this distinction has been far less important as in this case it was held that irrespective of the type of body which made the decision (i.e. 'administrative' or 'judicial'), procedural fairness and other such rules, are applicable.

LACORS' guidance "Judicial Review: A Summary" provides some further detail regarding the grounds of judicial review. However, the key item which should be borne in mind as regards the Elected Members sitting on Licensing Committees is that there must be **no procedural impropriety** and thus the decision must be *free from the appearance of bias* and that there must have been a *fair hearing*.

Free from the appearance of bias – 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"¹.

The key 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. This is demonstrated in the case of *R v Bow Street Magistrates ex parte Pinochet (No 2) (1999)* where Lord Hoffman disqualified himself as a judge in the case of the extradition of General

¹ *Re Medicaments and Related Classes of Goods No. 2 [2001] 1 W.L.R. 727*

Pinochet as Lord Hoffman had connections with Amnesty International, one of the parties to the case.

Further discussion of the case law affecting local authority decisions and functions under the Licensing Act 2003 is contained in section B3.

Fair hearing - For a hearing to be 'fair' a number of conditions must be satisfied including the right for the individual to know the opposing case; generally the right to call witnesses; the ability to question witnesses; the right to legal representation; and generally the right to be given reasons for any decision made. Sometimes a 'written' hearing will suffice and no 'oral' hearing is required.

Two well-know example cases relating to the right to a fair hearing are:

Cooper v Wandsworth Board of Works (1863) - A statute prohibited any building being erected without giving seven days notice to the Board of Works. Mr Cooper started putting up a house without giving notice and thus, the Board demolished the building. Whilst the Board was within its statutory powers in carrying-out the demolition, the Court held that the individual did have a right to a 'fair hearing' before the decision was taken.

Ridge v Baldwin (1964) - A Police Constable was dismissed without having been given a hearing by his superiors. This was held by the Court to have been 'illegal' as he was entitled to a fair hearing before any decision was made.

Licensing Committees will therefore need to follow clear procedures to ensure that the hearings which take place are fair and are seen to be fair: in addition to this guidance, LACORS' Committee Guidance will be available shortly.

4. The Human Rights Act 1998

The Human Rights Act 1998 incorporated into UK law the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms which was originally drafted and enacted by the Council of Europe in 1950. This Convention had been ratified in 1951, although the UK did not allow its citizens the right to petition the Court of Human Rights (in Strasbourg), until 1965.

Prior to the Human Rights Act 1998 the status of the rights provided for by the Convention, merely provided UK judges with another means of interpreting UK statute. However, since the enactment of the Human Rights Act 1998, judges have been able to utilise the rights set-out in the Convention as part of judicial review proceedings against public bodies.

All rights in the Convention are set-out in the form of Articles and it is Article 6 which is particularly important to consider with regards to Licensing Committee procedures and decisions.

Article 6(1) has been interpreted as requiring a tribunal which is independent from the Executive; and free from pressure and bias. The process must also be fair in terms of parties being able to put their case, hear and challenge witnesses.

The initial key question, however, as regards Licensing Committee decisions, is whether they involve a “*determination of...civil rights and obligations*”. It has been held that this can apply to proceedings before an ‘administrative’ tribunal (the Regional Land Commission) in *Eckle v Federal Republic of Germany 1989 5 EHRR1 para 73* and also to a decision of a public body where the consequences of an administrative decision affected an individual’s civil rights (see *Konig v Federal Republic of Germany 1980 2 EHRR 170* which concerned an individual’s licence to practice as a doctor in his own clinic). As regards Licensing Committees, it is also likely to be argued that the decisions affect a person’s civil rights in that the decision may affect his/her ability to earn a living and, in particular, affect a person’s possessions in the case of an existing licence holder.

Regardless of the view of the applicability of Article 6 to the decisions of Licensing Committees, the House of Lords has held¹ that, in any event, there is now no real difference between the common law test of bias and the requirements under Article 6 of an independent and impartial tribunal.

¹ *Lawal v Northern Spirit Ltd [2003] UKHL 35*

5. Purpose of this guidance

The Nolan Committee's Third Report stated:

"While we believe it is important that local authorities themselves should adopt their own codes of conduct, we recognise that this should be done within a national framework. There has to be a degree of consistency across local authorities and an assurance that certain minimum standards will be attained by any individual code...It would ensure that ownership of the code was held by that local authority. It would also enable the local authority to take into account specific local circumstances and to have the flexibility to change the detail of its code if those circumstances changed."

The Standards Board noted in its guidance *"Your Council may develop specific guidance building on the rules in the local code e.g. the way members should treat confidential information or how they deal with planning issues. However, any such guidance should not be considered as part of the local code, but as guidance on how to comply with it."* ("Guidance to Part III of the Local Government Act 2000 Local Authorities" Standards Board: http://www.standardsboard.co.uk/pdfs/guidance/Guide_Local_Authorities.pdf)

Subsequently the Local Government Association (LGA) produced guidance, and the Association of Council Secretaries and Solicitors (ACSeS) produced a model Members Planning Code of Good Practice, as regards 'Probity in Planning' to assist local authorities create their own codes relating particularly to the planning function. Planning was one local government system which was specifically referred to in the Nolan Third Report which stated that *"Planning was probably the most contentious matter with which local government deals and is the one on which we have received by far the most submissions. Inevitably the planning process produces both winners and losers. The planning process puts elected councillors into the position of being required to exercise their representational role on behalf of their constituents. Those who lose out frequently put the blame on the process itself."* Further, the Committee stated *"We have particular concerns ...about local authorities granting themselves planning permission"* (Summary of Third Report).

Who is to say that the same will not be thought of as regards the licensing process under the Licensing Act 2003? There will inevitably be licence applications which relate to premises which the local authority may view as important, for example for economic regeneration, and there is also the provision for local authorities to apply for their own Premises Licences covering public land, and indeed have been encouraged to consider doing so by the Government to help ensure cultural diversity (see Licensing Act 2003 Guidance 3.59).

This guidance is therefore provided to try to assist local authorities avoid the problems which were associated in the past with the planning function, thereby protecting themselves from accusations of maladministration or judicial review proceedings. As this guidance is fairly detailed it may be most appropriate for Licensing / Legal Officers to utilise in advising Members. A more concise leaflet will shortly be made available from LACORS which summarises the suggestions in this guidance and is intended for distribution to Members directly.

The guidance it must be stressed, is purely advisory, but it is clearly hoped that it will prove useful to local authorities in creating their own mechanisms to ensure public faith in the new system of licensing under the Licensing Act 2003.

B) SUBSTANTIVE ISSUES

1. Introduction

The National Model Code of Conduct is statutory and sets out expectations as to the conduct of Elected Members of local authorities in the conduct of their official duties (and to some extent, their private life). Crucial is the separation of private from public interests but there are also provisions regarding any actions bringing the authority into disrepute, relations with other Members, the public and staff, and treatment of confidential material. Elected Members are expected to comply with the spirit and letter of their local codes.

The following excerpts from the National Model Code of Conduct set out the general standards expected of Elected Members (please note that Schedule 2 of the National Model Code of Conduct sets-out the equivalent requirements for authorities *not* operating executive arrangements).

The National Model Code of Conduct (Authorities Operating Executive Arrangements) Part 1 General Provisions states:

1. A Member must observe the authority's code of conduct whenever he-
 - (a) conducts the business of the authority;
 - (b) conducts the business of the office to which he has been elected or appointed; or
 - (c) acts as a representative of the authority,and references to a member's official capacity shall be construed accordingly.

General Obligations

2. A member must-
 - (a) promote equality by not discriminating unlawfully against any person;
 - (b) treat others with respect; and
 - (c) not do anything which compromises or which is likely to compromise the impartiality of those who work for, or on behalf of, the authority.
4. A member must not in his official capacity, or any other circumstance, conduct himself in a manner which could reasonably be regarded as bringing his officer or authority into disrepute.
5. A member -
 - (a) must not in his official capacity, or any other circumstance, use his position as a member improperly to confer or secure for himself or any other person, an advantage or disadvantage; and
 - (i) act in accordance with the authority's requirements; and
 - (ii) ensure that such resources are not used for political purposes unless that use could reasonably be regarded as likely to facilitate, or be conducive to, the discharge of the functions of the authority or of the office to which the member has been elected or appointed.
7. A member must, if he becomes aware of any conduct by another member which he reasonably believes involves a failure to comply with the authority's code of conduct, make a written allegation to that effect to the Standards Board for England as soon as it is practicable for him to do so.

Further Sections of the National Model Code of Conduct cover Personal Interests, Disclosure of Personal Interests, Prejudicial Interests, Participation in Relation to Disclosed Interests, and the Register of Members' Interests.

The following provides detail on where items in the National Model Code of Conduct may impact specifically upon issues arising during the licensing process under the Licensing Act 2003. LACORS' suggestions as to how local authorities and their Elected Members may wish to interpret the National Model Code of Conduct in this context are provided. *These suggestions are in bold italicised font.*

LACORS' suggestions in all subsequent sections are also in bold italicised font.

2. Gifts & Interests - The National Model Code of Conduct

(a) Registration: The Local Government Act 2000 and the National Model Code of Conduct provide rules for the registration and disclosure of Members' interests. Guidance on these rules is provided by the Standards Boards and advice may be sought by Members from their local authority's monitoring officer. It is recommended that Members regularly review their situation in consideration of these rules.

A register of interests will be maintained by a local authority's monitoring officers and is open to public inspection.

A Member must provide the monitoring officer with written details of relevant interest within 28 days of his/her election to office. Any changes to his/her interests must be notified within 28 days of the Member becoming aware of the changes.

(b) Gifts: Members should be very cautious about accepting gifts or hospitality. Members are required by the National Model Code of Conduct to provide written notification of receipt of any gift/hospitality worth greater than £25 (or the maximum permitted by the local authority), within 28 days, to the monitoring officer of the local authority. *Each local authority will need to consider what level of gifts is acceptable in terms of members of a Licensing Committee under the Licensing Act 2003. To avoid potential perceptions of bias (see section B3) it may be appropriate that generally any gifts or offers are unacceptable. It is recognised that this is more stringent than the National Model Code of Conduct. However, in particular circumstances where a gift or offer is accepted e.g. free drinks, meals, admission to events etc. then local authorities may wish to follow a procedure that the details are registered and stored for example, on the licence file.*

(c) Interests: The National Model Code of Conduct utilises the terms 'personal' and 'prejudicial' interests.

'Personal' interests – A member must regard himself as having a personal interest in any matter if the matter in question relates to an interest which the Member has given notice of in the statutory register of Members' interests, or if a decision upon the matter might reasonably be regarded as affecting to a greater extent than other council tax payers, ratepayers or inhabitants of the authority's area, the well-being or financial position of themselves, a relative, or a friend, or

- any employment of business carried on by such persons;
- any person who employs or has appointed such persons, any firm in which they are 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 £5,000;
- 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.

The National Model Code of Conduct states that where a Member has a personal interest, the existence and the nature of the interest must be disclosed to any meeting where the issue is to be discussed, or as soon as it comes to light. However, the Member can still take part in the meeting and vote, unless the personal interest is also a prejudicial interest (see below).

The National Model Code of Conduct requires that where a Member with a 'personal interest' is part of a Licensing Sub-Committee which is deciding an application which relates to this interest then s/he must always disclose it to the Licensing Committee¹. The provisions of the National Model Code of Conduct are that this does not normally mean s/he will be debarred from taking part in the decision making process.

'Prejudicial' interests – A member must regard himself as also having a prejudicial interest 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.

The National Model Code of Conduct states that where a Member has such an interest s/he should not take part in any discussions about that interest, unless a dispensation² has been obtained from the authority's standards committee. S/he must declare what the interest is and withdraw from the meeting by leaving the room (see also *R (Richardson and Another) v North Yorkshire County Council and another [2003] EWCA Civ 1860*).

*As regards the Licensing Committee therefore a Member with a prejudicial interest must declare that interest and withdraw from the meeting, unless a dispensation has been obtained². This means withdrawing from the meeting in his/her official capacity, as well as in any other capacity as confirmed in *R (Richardson and Another) v North Yorkshire County Council and another [2003] EWCA Civ 1860*. This means therefore that a Member with a prejudicial interest cannot represent / be an 'interested party,' for example. If in doubt of his/her position the Member must consult with his/her Licensing or Monitoring Officer(s).*

(d) Licensing examples of personal & prejudicial interests

The key question therefore is "what are to be regarded as personal and prejudicial interests, in terms of the Licensing Act 2003?" It should be recalled that personal interests include those which affect the well-being or financial position of the Member. Examples of personal and prejudicial interests might therefore include where the Member (or their friend, family or employer):

- *lives very near to the premises in question (likely to have a personal interest and potentially a prejudicial interest);*
- *is a frequent visitor to the premises in a personal capacity (potentially a personal and a prejudicial interest);*
- *belongs to a lobby or campaign group which may be directly impacted by the outcome of the Licensing Committee hearing (personal and potentially prejudicial interest).*

¹ Local Authorities will provide their own guidance as to how such disclosures are to be made e.g. in writing with an assurance that the application has not been discussed between the Member and the other Licensing Committee Members in any way which may affect the outcome of the Committee's decision.

² NB. Dispensations are not possible for members of a Council's Executive.

(e) Exceptions to the rules on prejudicial interests

The National Model Code of Conduct states that there may be occasions where an exception may be made to the above rules on prejudicial interests. Paragraph 10(2) of the Model Code of Conduct states:

In such situations the Member needs to disclose his/her interest but can 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. If this is not evident then the exception may not apply and a prejudicial interest will have been observed.

In respect of the Licensing Act 2003 this situation may occur where the Member carries-out a function for another public authority or another local authority which is making an application for a licence, or which is making a representation. For example, if the local hospital or school is applying for a premises licence and the Member is on the Board of Governors of the school or involved in the management of the hospital. It may also occur where the Member is a 'dual-hatted' Member and is part of the District Council's Licensing Committee but also a Member of the County Council which is applying for a premises licence for its land.

Therefore, in such situations Members may wish to NOT avail themselves of this exemption as to do so may put the local authority at risk of being accused of bias.

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 subparagraphs 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." ("Lobby groups, dual-hatted members and the Code of Conduct – Guidance for Members" The Standards Board for England September 2004 p.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.” (“Lobby groups, dual-hatted members and the Code of Conduct – Guidance for Members” The Standards Board for England September 2004 p.6).

(f) ‘Advantages’ available to Members

Under the National Model Code a Member with a personal and prejudicial interest shall also not “improperly influence a decision about that matter”. What this means is that a Member must not use any advantage available to them as a Member which would include, for example, access to Officers and other council Members.

In respect of the Licensing Act 2003 Section B5 Lobbying of / by Councillors should be referred to. The Member should not have access to papers and persons which would not be available to an ordinary member of the public, and must not be able to address or view the proceedings of the Licensing Sub-Committee, which are not available to members of the public.

The Standards Board for England published in September 2004 a guide, entitled “Lobby groups, dual-hatted members and the Code of Conduct”, which Licensing Members and Officers shall have regard to.

3. Licensing Sub-Committees - Bias and Predetermination

(a) Introduction

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” (*Re Medicaments and Related Classes of Goods No. 2 [2001] 1 W.L.R. 727*). As mentioned in section A3 (Natural Justice – rules of the English Common Law), 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’¹.

Further, where the decision to be made is quasi-judicial, as at Licensing Sub-Committees, the key issue to ensure the legality of the decision is the “public perception of a probability of unconscious bias”². This brings into consideration the previous dealings of members of the Licensing Sub-Committee and views expressed by them. ***Members should therefore avoid participating as a member of a Licensing Sub-Committee where previous voting or statements of belief may alter that “objective impression conveyed”***³. 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 you’re 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”. (“Lobby groups, dual-hatted members and the Code of Conduct – Guidance for Members” The Standards Board for England September 2004) The sections on Gifts & Interests (B2) and Lobbying (B5) are particularly relevant in this regard.

‘Bias’ also includes the situation where it is felt that the decision-maker has pre-determined the case based upon his/her own prejudices.⁴ 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’⁵

To help avoid accusations of pre-determination and ensure that Ward Members are free to represent their constituents as ‘interested parties,’ it may be advisable for local Licensing Authorities to consider that Ward Members do not sit on Licensing Sub-Committees where that Committee is considering an application in that Member’s Ward.

(b) ‘Structural’ Bias

A potential issue concerning bias or pre-determination in relation to the Licensing Act 2003, is where a Member sitting on the Licensing Sub-Committee is a Member for another authority function such as economic development / regeneration, where that function’s policy / decisions either impliedly or explicitly support (or indeed, opposes) the application. This might, for example, include the scenario where an ‘Open Spaces’

¹ *Porter v. Magill [2002] 2 AC 357 at 494 [103]*

² *Lawal v Northern Spirit Ltd [2003] UKHL 35*

³ *Costas Georgiou v Enfield LBC [2004] EWHC 779 (admin) QBD*

⁴ For discussion of this see *Locabail UK v Bayfield Properties (2000)*

⁵ *Costas Georgiou v Enfield LBC [2004] EWHC 779 (admin) QBD*

plan has been agreed and indicates that some areas of the local authority land will be licensed for entertainment purposes under the Licensing Act 2003 (explicit support); or where an economic regeneration plan includes the provision to encourage more theatres and restaurants to an area (implicit support).

In this regard, judicial discussion has noted that there is a difference between pre-determination and a pre-disposition arising from structural or political bias.¹ And it has been stated that “...there is a degree of permissible structural bias built into the statutory framework for local authority decision-making” Cummins v Camden LBA and SSTER [2001] EWHC Admin 1116 at para. 261. However, there is a crucial distinction between party political policy or structural matters, involving Members in a wider policy setting context, and where a Member has acted as an advocate for or against a licence application via their actions in another forum of the local authority or public body. The latter may well give rise to the perception that s/he has pre-judged the issue or having introduced a real possibility of bias.

Local authorities may wish to agree procedures to cover such situations and advise that the Member concerned makes a disclosure of his/her position, in advance, to the Licensing Sub-Committee which will consult with the Sub-Committee’s legal advisor to decide if the Member can take part in the decision-making. Licensing Authorities may wish to be cautious and where there is doubt, decide to exclude the Member from the decision making. A useful case to note on this point is the planning case of Costas Georgiou v Enfield LBC [2004].

As mentioned previously, 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.” (“Lobby groups, dual-hatted members and the Code of Conduct – Guidance for Members” The Standards Board for England September 2004 p.16)

Potential ‘structural bias’ may also be perceived where the Licensing Policy Statement includes provision that the local authority intends to licence its land and the Member took part in the Council meeting which approved the policy statement (e.g. Full Council meeting). In such a situation Members would NOT normally be excluded from the Licensing Sub-Committee on this basis as it would make the decision-making process unworkable. The only exception would be where the Member involved could reasonably be seen as having been a leading or particular advocate for or against the proposal.

(c) Difference between the Personal / Prejudicial Interests provisions of the National Model Code of Conduct, and Bias at Common Law

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

¹ As referred to in Bovis Homes Ltd v. New Forest DC [2002] EWHC 483 (Admin) it was stated in Cummins v Camden LBA and SSTER [2001] EWHC Admin 1116 at para. 261 ¹that “There is an important distinction between bias from a personal interest and a predisposition, short of predetermination, arising say from prior consideration of the issues or some aspect of a proposal. The decision-making structure, the nature of the functions and the democratic political accountability of Councillors permit, indeed must recognise, the legitimate potential for predisposition towards a particular decision. The source of the potential bias has to be a personal interest for it to be objectionable in law.” For further case law on this area see Cummins v. Camden LBC and SSTER [2001] EWHC Admin 1116, R v. SSE ex p. Kirkstall Valley Campaign Ltd [1996] 3 All E.R. 304 and R v. Amber Valley DC, ex p. Jackson [1984] 3 All E.R. 501 and Costas Georgiou v Enfield LBC [2004] EWHC 779 (admin)

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 Sub-Committee 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 National Model Code of Conduct, however, only concern themselves with the definition of a personal interest under the National Model Code of Conduct, first, and only then is the test as to whether or not that personal interest may be prejudicial then applied.

In terms of effects, a Member who has a personal and prejudicial interest may not take part in the Licensing Sub-Committee 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 Sub-Committee but may act on behalf of (or as) an 'interested party'.

Members should also be made aware that, because personal and prejudicial interests under the National Model Code of Conduct are concerned with acting in the wider public interest, matters may be caught as a personal and prejudicial interest under the National Model Code of Conduct which would not be considered to amount to bias under the common law.

For the Licensing Authority, bias may vitiate its decision on an application. Personal and prejudicial interests, in contrast, are ostensibly a matter for the Member concerned to disclose, act upon and take responsibility for. It must be recognised, however, that knowledge of the potentially undisclosed personal and prejudicial interest may be such that it would be irrational for the Authority or Sub-Committee to continue without taking action in response to it, and may therefore in turn, vitiate the Licensing Authority's decision.¹

¹ *R (Richardson and another) v North Yorkshire CC and another [2003] EWCA Civ. 1860*

4. Applications submitted by the Local Authority

Local authorities may apply for their own Premises Licences so as to licence areas of public space. Indeed the Government's Guidance encourages this:

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. The discussions in the preceding sections B2(e) and B3(b) should be considered in this respect. *It might also be worth considering whether such applications are always decided by the Licensing Committee and not the Licensing Officer, even where there are no representations, to minimise any potential appearance of bias.*

5. Lobbying of / by Councillors

Local democracy: The Licensing Act 2003 sets-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 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 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 (see Licensing Act Section 13(3) and Guidance at 5.32).

The National Model 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 (see section B2). 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 National Model Code of Conduct does not require the Member to withdraw from the meeting unless there is also a prejudicial interest, *local authorities may wish to decide that in such a situation the Member does not sit so as to avoid perceptions of bias, especially as the Sub-Committee is made-up of no more than 3 Members. However, this would not preclude the Member attending the meeting either as the licence applicant, or being / representing an 'interested party'.*

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.

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.” (“Lobby groups, dual-hatted members and the Code of Conduct – Guidance for Members” The Standards Board for England September 2004)

Appearance of bias: Whilst lobbying of Members is legitimate and certain Members may make representations to the Licensing Committee on behalf of 'interested parties', it is crucial for the Licensing Authority and its Committee to ensure that there is neither actual nor an appearance of bias in its decision-making. It should also be remembered that concerns about political lobbying were the basis of the concerns which lead to the first Nolan Committee on Standards in Public Life.

To avoid an appearance of bias the following advice can be directed at Members:

- *No Member sitting on the Licensing Sub-Committee 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 Sub-Committee which is considering the application and address the Sub-Committee as an 'interested party'.*
- *If a Member who sits on the Licensing Sub-Committee 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 Sub-Committee wishes to represent them then s/he will need to excuse him/herself from the Licensing Sub-Committee.*
- *Members who are part of the Licensing Sub-Committee must avoid expressing personal opinions prior to Licensing Sub-Committee 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 Policy.*
- *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. It may be advisable that the Chair of the Licensing Sub-Committee should state, during proceedings, that no member of the Sub-Committee is bound by any party whip.*
- *Councillors must not be members of the Licensing Sub-Committee if they are involved in campaigning on the particular application.*
- *Other Members (i.e. 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 Sub-Committee Members as this can easily be viewed as bias / pressure and may well open that Sub-Committee Member to accusations of such. Whilst a full prohibition upon discussing such issues with Committee Members by other Members may be impractical and undemocratic, local authorities are advised to*

produce local guidance for Members on how such matters can be dealt with.¹ Such guidance could include a definition of what is viewed as excessive e.g. attempting to obtain a commitment as to how the Member might vote.

- *Members must not pressurise Licensing Officers to make any particular decisions or recommendations as regards applications (such as the ability to decide whether an application is frivolous or vexatious as per Section 18(7)(c)).*

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 Sub-Committees (unless they have a prejudicial interest), local authorities may find it helpful to include in procedures that Members whose Ward includes the application, or whose Ward is likely to be affected by the application, are advised to not sit on the Licensing Sub-Committee considering the application but that s/he may wish to act as / or represent an 'interested party'.

¹ *"It is undemocratic and impractical to try to prevent councillors from discussing applications with whomever they want: Local democracy depends on councillors being available to people who want to speak to them. The likely outcome of a prohibition would be that lobbying would continue but in an underhand and covert way." (Nolan Committee Report into Standards in Public Life 285 p. 72)*

6. Pre-application / pre-decision discussions

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 Licensing Authority must ensure it is not open to accusations or / appearance of bias. ***The Licensing Authority must therefore ensure that such advice and assistance is clearly identified as being such and is not any type of 'predetermination'.***

Bearing in mind the available resources, some suggestions on how this can be achieved by the Licensing Authority are:

- ***Ensure that there are clear guidelines on how such pre-application / pre-decision discussions should take place, for both applicants, Members and Officers.*** This may include advice to applicants that they should not approach Licensing Sub-Committee Members to engage them in pre-application / pre-decision discussions, and that all queries should be addressed to the Licensing Officer (or an officer of any local authority 'responsible authority') in the first instance.
- ***Licensing Committee 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.***
- ***Ensure to keep full meeting notes on file*** where the meeting / telephone conversation / e-mail communication is contentious (precise arrangements for the necessity to keep meeting notes should be decided by each local Licensing Authority) and follow-up letters can also be useful to confirm the nature and content of the meeting which took place.
- ***Make clear that the discussions do not bind the Licensing Authority*** to any particular decision and when suggestions are made that these are provisional only.
- ***Advice must be consistent with the Licensing Objectives and the Licensing Authorities Statement of Licensing Policy.***
- ***Make clear the limited decision making power of the Licensing Officer.***
- ***Advice must be impartial.***

7. Role of the Licensing Officer

Licensing Officers have no ability under the Licensing Act 2003 to make representations or to be a party to the hearing. ***There is no legal provision for Licensing Officers to make recommendations to the Sub-Committee 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 Guidance and the local Licensing Policy Statement may be useful.

Each local authority would be advised to set-out clearly the role of its Licensing Officer(s) in the decision process covering topics such as pre-application / pre-decision discussions, site visits etc.

8. Decision making

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 as well as the Licensing Authority's Licensing Policy Statement. Whilst the Government's Guidance accompanying the Licensing Act 2003 indicates some other factors which may influence decisions (e.g. live music / cultural considerations) these will always be subservient to the Licensing Objectives and the Licensing Policy Statement. LACORS "Committee Guidance" will be available shortly.

9. Site visits

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. If a Licensing Authority believes that there might be occasions where visits are required then it would be advised to have set-out the reasons why this might be the case in local guidance, so that there are clear criteria for justifying any visit, which can be documented. Licensing Authorities would also be advised to have clear guidance as to how the visits are conducted.

10. Complaints Systems & Record keeping

Licensing Authorities may wish to review their complaints records procedures to ensure that they fully cater for the new functions under the Licensing Act 2003.

The Ombudsman has provided advice on the setting up of a complaints system entitled "Running Complaints System" (<http://www.lgo.org.uk/guidance.htm>).

Generally, complaints system, with regard to the licensing function, should ensure that:

- Record keeping is complete and accurate to ensure that complaints can be fully investigated.
- Full and comprehensive files are maintained throughout the life of the licence.
- It should be possible for someone not involved in the application process to understand what the decisions were and why and how reached, by reading the file. Particular care to be taken when a decision has been delegated to the Officer level.

Local record keeping procedures for the Licensing Act 2003 functions need to be devised and *any decisions of the Licensing Officer as regards applications deemed frivolous or vexatious must be recorded clearly with full reasons provided.*

REFERENCES & WEBSITE LINKS

DETR (now ODPM) "New council constitutions: guidance pack / Modular constitutions for English local authorities" states:

http://www.odpm.gov.uk/stellent/groups/odpm_localgov/documents/page/odpm_locgov_60566_0.hcsp

Good Practice Note No 1 - 'Devising a Complaints System'" <http://www.lgo.org.uk/guidance.htm>

LACORS <http://www.lacors.gov.uk>

LGA <http://www.lga.gov.uk/>

Local Government Ombudsman: <http://www.standardsboard.co.uk>

National Model Code of Conduct:

http://www.odpm.gov.uk/stellent/groups/odpm_localgov/documents/page/odpm_locgov_60540_0.hcsp

Nolan Committee Reports: <http://www.public-standards.gov.uk/reports/index.htm>

The Standards Board - <http://www.standardsboard.co.uk/>

Guide to Part III of the Local Government Act 2000:

http://www.standardsboard.co.uk/pdfs/guidance/Guide_Local_Authorities.pdf

How do I register and declare interests, and register gifts and hospitality?:

http://www.standardsboard.co.uk/pdfs/guidance/Interests_Local_Authorities.pdf

The code to protect you:

http://www.standardsboard.co.uk/pdfs/guidance/The_Code_to_Protect_You.pdf

"Lobby groups, dual-hatted members and the Code of Conduct"

http://212.100.226.165/pdfs/guidance/Lobbying_guidance.pdf

CASE LIST

Bovis Homes Ltd v. New Forest DC [2002] EWHC (Admin)

Cooper v Wandsworth Board of Works (1863)

Costas Georgiou v Enfield LBC [2004] EWHC 779 (Admin)

Cummins v Camden LBA and SSTER (2001) EWHC (Admin)

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R v. SSE ex p. Kirkstall Valley Campaign Ltd [1996] 3 All E.R

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Locabail UK v Bayfield Properties (2000)