

## **The Localism Act and predetermination in decision making**

### **KEY POINTS:**

- **Predetermination still exists and a member should have an open mind in a decision making meeting**
- **The Localism Act blocks legal challenge based on an allegation that a member has previously done or said something which indicates how they intend to vote**
- **The new provisions apply to decisions taken after 15 January 2012**
- **Case law will add to the interpretation of these provisions over time**

### **The intention behind the Localism Act's provisions on pre-determination**

The Plain English Guide to the Localism Act, produced by the Department for Communities and Local Government (CLG), explains the reasons for a change in the law and the intention behind the new legislation as follows:

“The Government has used the Localism Act to clarify the rules on ‘predetermination’. These rules were developed to ensure that councillors came to council discussions - on, for example, planning applications - with an open mind. In practice, however, these rules had been interpreted in such a way as to reduce the quality of local debate and stifle valid discussion. In some cases councillors were warned off doing such things as campaigning, talking with constituents, or publicly expressing views on local issues, for fear of being accused of bias or facing legal challenge.

The Localism Act makes it clear that it is proper for councillors to play an active part in local discussions, and that they should not be liable to legal challenge as a result. This will help them better represent their constituents and enrich local democratic debate. People can elect their councillor confident in the knowledge that they will be able to act on the issues they care about and have campaigned on”.

### **When and how the new provisions come into force**

Section 25 of the Localism Act 2011 provides the mechanism to clarify the rules. It applies to decisions taken after 15 January 2012 by Councillors and Co-opted Members. It does not apply to decisions taken by officers.

### **What is different?**

The new rules, expressed in S25, are set out below:

“A decision-maker is not to be taken to have had, or to have appeared to have had, a closed mind when making a decision just because:

- (a) the decision-maker had previously done anything that directly or indirectly indicated what view the decision-maker took, or would or might take, in relation to a matter, and
- (b) the matter was relevant to the decision.”

Without the change in law, a member who is already predisposed towards a particular view must demonstrate that his or her mind is not closed, by making it clear that, whatever views he or she has expressed previously, they will take any decision on the information and

representations before them at that time. A member who had actively campaigned or supported a particular approach may have found this impossible, and precluded themselves from participating in the decision.

The Act assists a member in that position, because indicating in advance what view he or she “would take” at a decision making meeting can no longer be regarded as evidence of a closed mind, for the purposes of challenging that decision. Under S25 a Member will be able to express strong opinions and even tell people that he or she intends to vote in a particular way, without fear of a challenge based on bias or predetermination.

### **Limitations and grey areas**

The concept that a decision-maker should approach a decision with an open mind remains a key principle of public law. The Localism Act does not abolish predetermination as such; instead it provides a protection from challenge by identifying specific behaviour which cannot be regarded as evidence of a closed mind. The use of the words “just because” in the Act limit that protection to things the member has done or said to indicate what view he or she took, or would or might take. The purpose of clarifying the law is to ensure councillors can be involved in “campaigning, talking with constituents, or publicly expressing views on local issues” without “fear of being accused of bias or facing legal challenge”. The Act does not prevent a challenge based on bias or predetermination arising from other factors. Evidence of personal bias arising, for example because a member would be personally affected by a decision they are making, would still lead to an unsound decision vulnerable to challenge.

Neither does the Localism Act remove the requirement to ensure that decisions are reasonable in the legal sense. This means that, at the time a decision is made, the Council should be able to demonstrate that all relevant matters have been taken into account and that irrelevant considerations have not influenced that decision. Consultation responses, equality impact assessment and in the case of planning, all material considerations, should have been put forward and discussed at a meeting before a decision is taken, whatever prior indication an individual member may have given regarding his or her views on a particular matter

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