

# *Tendring* *District Council*



## **Part 6 – Licensing and Registration Probity Protocol**

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## 1 INTRODUCTION

### 1.1 In this Protocol:

- **“Councillors” or “Members”** - Unless stated otherwise, references to Councillors/Members in this Code are to those Councillors dealing with Licensing matters via their appointment to Licensing Committee.
- **“Licensing Committee”** means the Licensing and Registration Committee, the Premises/Personal Licences Sub-Committee and Miscellaneous Licensing Sub-Committee. It also refers to the Planning Committee should it consider a combined matter involving premises matters under the Licensing Act 2003 and to the Full Council when dealing with licensing matters.
- **“Licensing matters”** include all applications for, and reviews of, licences, consents, permits and registrations etc. as set out in the Committee’s terms of reference within Part 3 of the Council’s Constitution.
- **“Party”** for Licensing purposes includes an applicant, or an objector.
- **“Interested party”** is any other person who has submitted a valid representation within the prescribed timescales in respect of the matter concerned and has a right to attend the hearing.
- **“Licensing administrative fairness duty”** means the particular responsibilities of the Licensing Committee Members who sit in formal administrative hearings and consider matters fairly following rules of natural justice and the relevant principles of the Human Rights Act 1998 in a non-political manner and make decisions in the public interest within (and for the purposes) of the particular licensing legislative framework.
- **“Monitoring Officer”** means the designated Officer and in their absence the reference to Monitoring Officer shall be deemed to include the Deputy Monitoring Officer.

### 1.2 There are fundamental principles of English Law that every decision-making body must observe and be seen to observe. These are called “the principles of natural justice” and they include:-

- (1) the right to have a fair determination;
- (2) there should be no bias leading up to, or in, the decision reached.

In arrangements for licensing matters to be heard and determined the Council will be focused on these principles. It will, in so far as it is able, also seek to minimise situations where it will be determining cases it itself would be a party in and otherwise make specific provisions for a separation of such roles.

### 1.3 This Protocol has been prepared:-

- (1) to assist Members to observe these principles in relation to reaching decision on licensing matters; and
- (2) to provide guidance to Members on how to maintain high standards of conduct in relation to their licensing responsibilities and also on how the Council’s Code of Conduct applies to the licensing systems. It does not however replace or in anyway modify that Code.

### 1.4 In view of 1.2 and 1.3 above, Members should follow this Protocol when they deal with licensing matters. It is also important that Members follow all other Protocols of the Standards Committee as the Protocol is given in accordance with the Standards

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Committee's delegation to promote and maintain high standards of conduct by Members and co-opted Members of the Council.

- 1.5 One of the single largest areas of licensing that the Council is the licensing authority for relates to authorisations under the Licensing Act 2003. The activities regulated under this Act are:
  - the sale of alcohol
  - the supply of alcohol by a members' club
  - regulated entertainment
  - late night refreshment
- 1.6 The Licensing Act 2003 is underpinned by four specific licensing objectives, which the licensing authority and the responsible authorities are required to promote in relation to premises and people licenced under the Act. The objectives are:
  - the prevention of crime and disorder
  - public safety
  - the prevention of public nuisance
  - the protection of children from harm
- 1.7 Each of the objectives carries an equal significance.
- 1.8 The Licensing Act 2003 identifies the Authority itself as a designated Responsible Authority along with the likes of the Police, Trading Standards, Environmental Health, Children's Services etc. Each Responsible Authority has their own enforcement responsibilities in relation to premises licensed under the Act and each recognises the importance of effective co-operation and liaison to ensure that licence holders, designated premises supervisors, personal licence holders and club premises certificate holders both understand and comply with the law.
- 1.9 The Government strongly recommends that licensing authorities establish protocols on enforcement issues and, more generally, work collaboratively to promote the four licensing objectives in respect of matters covered by the Licensing Act 2003.
- 1.10 The Licensing Act 2003 is not the only legislative framework that the Council is the Licensing Authority for. Each framework applies different tests and responsibilities on the Council and others. One other such licensing framework is the Gambling Act 2005 and the Council (as Licensing Authority) is charged with promoting the three objectives in that Act in respect of applications, notices and determinations under that Act. The 2005 Act objectives are:
  - \* 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
  - \* protecting children and other vulnerable people from being harmed or exploited by gambling.
- 1.11 The Licensing Act 2003 and the Gambling Act 2005 put local authorities firmly at 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. Another large part of the work of the Council in respects of licensing is that related to Taxi and Private Hire Services. The framework for this area of licensing

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is set out in the Town Police Clauses Act 1847 and the Local Government (Miscellaneous Provisions Act 1976 (as amended and otherwise impinged by a range of other more recent legislation). Nationally there is guidance around vehicle standards and statutory guidance around driver expectations. While there are not the same 'objectives' clauses in the relevant Acts for Taxi and Private Hire Services, there is a clear approach that the fundamental consideration of the licensing Authority is public safety and consumer protection.

- 1.12 The role of Elected Members as part of the Licensing Committee is to examine the matters before them and apply the requirements upon them (and the Authority more generally) with an open mind and consider all relevant facts in determining the appropriate outcome of the matter. 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.
- 1.13 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 Monitoring Officer. If the breach is also a breach of the Code of Conduct for Members the matter will be dealt with through its associated complaints process.
- 1.14 The Protocol can be changed at any time by resolution of Council.

## **2 ROLE OF COUNCILLORS**

- 2.1 The role of an Elected Member at the Licensing Committee involves sitting in a formal hearing and following the rules of natural justice and the relevant principles of the Human Rights Act 1998 in making decisions.
- 2.2 Applying those principles, the following approach to hearings will be applied:-
  - (1) A party at a Committee must be provided with the written report together with any other information received regarding the substance of any allegation or objection or allegations (which may be relevant in the context of a proposed revocation of a licence or details of the application) and this is usually in the form of the written report to attendees (see (2) below)
  - (2) The written report must be provided to the party in a reasonable time for them to read and understand the content of the objection, allegation or, as the case may be, details set out in the report and the arrangements for representation
  - (3) A party must be able to put their case and be represented if they so wish and is entitled to a fair hearing
  - (4) A party must be able to present their case under conditions that do not place them at a disadvantage
  - (5) A party must be entitled to have their representations taken into account by the Committee
  - (6) Any member of the Committee having a Disclosable Pecuniary Interest or a local interest in the matter before the Committee must declare the nature of that interest and in the case of a Disclosable Pecuniary Interest must withdraw from the room in which the meeting is being held whilst the matter is being considered

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(7) The Committee should not make an irrational decision by taking into account matters it ought not to take into account of and/or taking into account matters of which it should take account

(8) There should be no bias leading up to, or in, the decision reached

(9) In its decision making, the Committee must ensure that its decision is proportionate to the case before it

2.3 Councillors serve the public and are responsible to the electorate. Officers advise Councillors and the Council and carry out the Council's work. Officers are employed by the council, not by individual Councillors, and it follows that instructions may only be given to Officers through a decision:-

- at a meeting of the Executive or of the Council, or a Committee or a Sub-Committee of either, or
- by an individual decision of the Leader or a Portfolio Holder properly taken in accordance with the decision-making protocol.

In so far as this Protocol is concerned, instructions will be taken by the Licensing Committee and relate to the matter being considered by the Committee.

2.4 It is crucial that Councillors serving on the Licensing Committee, or who become involved in making a licensing decision, must observe the requirement that a Member:-

*"must not use or attempt to use [their] position as a Member improperly to confer on or secure for [themselves] or any other person, an advantage or disadvantage"*

2.5 Councillors and Officers have different but complementary roles. Both Officers and Councillors are also subject to Codes of Conduct with which they must comply.

2.6 Councillors and Officers will treat each other with respect at all times and not engage in personal criticism in the course of any meeting. Concerns about Officer and Councillor conduct should be addressed to the Corporate Director (Law & Governance) (Monitoring Officer) or the Assistant Director (Corporate Policy & Support).

2.7 Councillors can expect Officers to give them all reasonable assistance in answering questions on licensing matters, except where that would infringe this or other codes, or contravene legal rules such as data protection. An Officer will state the reason if there are any such limitations on their ability to assist with Councillor queries.

2.8 Councillors serving on the Licensing Committee must determine each application/matter on the evidence presented by (or on behalf of) both the applicant/licensee and interested parties at a hearing. Councillors need to take account of relevant representations made by the applicant/licensee and interested parties but should not favour any person, group, company or locality, not put themselves in a position where they appear to do so, in making the decision. Councillors are barred from sitting on any Licensing Sub-Committee determining applications which fall within their own Wards only where they have a **prejudicial** interest under the Members' Code of Conduct. If the Member has a partner who is also an elected Councillor, they should not sit on the Licensing Committee hearing a matter concerning a premises in the Ward their partner represents or a person who lives in that Ward.

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- 2.9 Members must comply with the provisions of the Code of Conduct for Members which has been adopted by the Council, and which sets out the required standards of conduct for Councillors. 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.

## 3 RELATIONSHIP TO MEMBERS' CODE OF CONDUCT

- 3.1 The rules contained in the Members' Code of Conduct must always be complied with first. These are both the rules on Disclosable Pecuniary Interests (DPIs) and any other interests identified by the Council, and the general rules and obligations giving effect to the (Nolan) Seven Principles of Public Life: Selflessness, Integrity, Objectivity, Accountability, Openness, Honesty and Leadership.
- 3.2 The requirements set out in the Code of Conduct on dealing with gifts and hospitality can be particularly relevant when dealing with licensing issues. Councillors and Officers should be very circumspect in response to any offers of gifts and hospitality, should seek appropriate advice where necessary, and should record in the relevant register any gifts and/or hospitality they do receive or refuse. This applies particularly in circumstances where it is known that licensing applications have been submitted, or are likely to be submitted, by the parties making such offers.

### DECLARATIONS OF INTEREST

- 3.3 The Council's Code of Conduct sets out requirements for Members on declaring Disclosable Pecuniary Interests, Other Registerable Interest and Non-Registerable Interests and the consequences on participation of having such an interest. These must be followed scrupulously, and Members should review their situation regularly. Not only should impropriety be avoided but also any appearance or grounds for suspicion of improper conduct.
- 3.4 A Member with a Disclosable Pecuniary Interest in respect of a particular licensing matter must declare it and take no part in the discussion or the determination of the proposal. Preferably this should take place prior to the hearing itself as a consequence of enquiries proceeding the despatch of the meeting papers or following this point upon the Member reading those papers. If the declaration takes place at the hearing, he or she should leave the room before the item is considered. The responsibility for this rests with each Member. Advice can be obtained in advance from the Monitoring Officer if required, in advance of a Licensing Committee. It is unsatisfactory if a Member asks for guidance in the course of a debate.
- 3.5 **Do take into account when approaching a decision that the principle of Integrity (one of the Nolan Principles – one of the Seven Principles of Public Life) is defined as**

*“Holders of public office must avoid placing themselves under any obligation to people or organisations that might try inappropriately to influence them in their work. They should not act or take decisions in order to gain financial or other material benefits for themselves, their family or their friends. **They must declare and resolve any interests and relationships.**”*

- 3.6 It is therefore advisable that Members:

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- (i) Note that you are not prevented from seeking to explain and justify a proposal in which you may have a conflict of interest to an appropriate Officer, in person or in writing, but that your role as a Councillor may place additional limitations on you in representing the proposal in which you have an interest.
- (ii) Notify the Monitoring Officer in writing where it is clear to you that you have a Disclosable Pecuniary Interest or other personal conflict of interest and note that:
  - you should send the notification no later than submission of that application where you can;
  - provided the licensing framework permits this, the proposal will be reported to the Committee as a main item and not dealt with by Officers under delegated powers or, if the framework prevents this, it will be reported for information to the Committee at its next meeting setting out relevant officer decision and the decision;
  - you must not get involved in the processing of the application; and
  - it is advisable (but not mandatory) that you employ an agent to act on your behalf in respect of the proposal when dealing with Officers and in public speaking at Committee

## 4 APPLICATIONS SUBMITTED BY COUNCIL, MEMBERS OR OFFICERS

- 4.1 A Licensing application to the Council as Licensing Authority by serving and former Councillors, their family members and close associates, are perfectly legitimate. However, it is vital to ensure that they are handled in such a way that provides no grounds for accusations of favouritism or suspicion of impropriety.
- 4.2 Councillors on the Licensing Committee should not act as agents for people pursuing licensing matters within their Authority. Similarly, if they submit their own proposal to the Council as Licensing Authority they should state the nature of their interest and play no part in its processing and should, unless they are named specifically as the applicant on the requisite forms, notify the Council's Monitoring Officer of its submission.
- 4.3 Submission of an application by, or concerning, a Councillor would be regarded as a Disclosable Pecuniary Interest for the Councillor under the Council's Code of Conduct and as such, she or he must not attend any hearing during the consideration of the matter other than to exercise any rights that applicants or the wider public have to make representations, answer questions or give evidence.
- 4.4 The Council's Code of Conduct provides that Members should "not seek improperly to influence a decision about this matter" – this however does not imply that a Member is not able to explain their position to an Officer in advance of consideration by a Committee. The Member should take great care, of course, not to compromise the impartiality of anyone who works for, or on behalf of, the Council. They should also be aware that:
  - they should have no further access to Officers, documentation, etc than would be available to a member of the public
  - they should scrupulously avoid placing pressure on any Officer

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- their position as a Councillor creates a public expectation that the Member will observe the requirements of licensing legislation in relation to their own private property interests, or a property-owning company in which they have a material interest.
- 4.5 Although a Member may make a written submission in a private capacity to relevant Officers, they should not be made to individual Members. If a proposal is submitted by a family member, close associate or other “relevant person” then the Member must consider whether they have a Disclosable Pecuniary Interest in the application, and, if so, take no part in its processing. In any event, they should outline the association at the hearing for the record.
- 4.6 Applications may be received by the Council as the Licensing Authority from the Council itself acting in another capacity. This could include a licence application for a Council sponsored event or for Council owned premises. This could also include an application for a review of a premises licence/club premises certificate following a determination by the Council as an Environmental Health, Planning or Licensing Authority itself. Under the Licensing Act 2003, this situation is expressly permitted. Such applications will be dealt with in the same way as any other application and will give no advantage or disadvantage to the fact that it has been submitted by the Council (or following a recommendation). This should be no recommendation for a review of a premises licence/club premises certificate from the Full Council.
- 4.7 No Member of the Executive or any Committee making an application should seek to influence in any way the determination of the application/review by the Licensing Committee other than by having participated in the decision to apply for the licence/call for a review. Where the application is on behalf of the Council and is to be determined by the Licensing Committee, that Committee shall not be comprised of a Member of the Cabinet/Executive. They shall excuse themselves from participation as a Member of the Cabinet.
- 4.8 As identified earlier (at 3.6 above), applications submitted by Councillors, or by Officers in the Licensing Service, will as a general principle, be referred to the Licensing Committee for information. However, for legal reasons it will not be possible for the Licensing Committee to determine all such applications – for example, the Council normally has no option but to grant an uncontested application under the Licensing Act 2003. However, an information report will be submitted to the next meeting of the Committee in the spirit of openness and transparency. At that meeting, Members of the Committee will be free to ask about compliance with this Protocol by those involved in the application.
- 4.9 In the processing of relevant applications, references will be made to the Council, Councillors or Officer interest. The Councillor or Officer concerned will take no part in handling the application or determining the recommendation or making the decision on the application.
- 4.10 Where a Councillor frequently declares an interest in the Committee meetings and therefore is unable to take part in the proper consideration of licensing matters it will be referred to the Monitoring Officer who will decide whether to raise the matter with the relevant Group Leader, solely, for the purposes of determining whether another Member of that Group should take that allocated seat on the Committee.
- 4.11 A decision on the Council’s own licensing applications will be made in accordance with the same procedures applying to licensing applications submitted by other applicants. Licensing Committee members must give no regard to the interests of the Council

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itself, aside from receiving and taking into account, as permitted by law, any relevant representations received.

- 4.12 Members who are part of the Council's decision to apply for a licence, or who express a view in respect of such an application, should not be part of any hearing to determine the licence. Expressly there must not be any predetermination to grant the application solely because it has been submitted by the Council.
- 4.13 Councillors serving on other Council Committee/Scrutiny and Review Panels who also sit on the Licensing Committee are not permitted to have any prejudicial interest, which would disqualify them from taking part in the decision. If individual Councillors in this situation consider that they should declare an Other Registerable or Non-Registerable interest, they *may* still be permitted to speak and vote. Councillors are also at liberty to withdraw from the meeting if they so wish. Relevant Council Officers and, in particular, the Monitoring Officer will be pleased to give advice when Councillors are concerned over a conflict of interest.
- 4.14 The Council could apply for their own Premises Licences. Such applications must be, and be seen to be, dealt with fairly. During such an application process it is therefore important to be aware of any potential appearance of bias.

## **5 MEMBER TRAINING**

- 5.1 A Member (or designated named Substitute Member) cannot sit as a member of the Licensing and Registration Committee unless they have received specific training with regard to the determination of licensing applications (Part 4 – of the Constitution – Council Procedure Rules).
- 5.2 From time to time, the Council will provide training for Councillors on licensing matters. This will achieve compliance with the requirements for training under paragraph 5.1 above, new legal requirements on changes in national guidance from Government, the Gambling Commission etc or otherwise to extend the knowledge of Councillors sitting on the Licensing Committee. Training is also available 24/7 on the LGA's Learning Portal and is a good basis for introducing the requirements of the various licensing frameworks. The LGA also has an annual licensing conference and the Committee's Chairman and Vice-Chairman will be invited to attend this each year.
- 5.3 Members should not participate in decision making at meetings dealing with licensing matters if they have not attended the mandatory licensing training prescribed by the Council.
- 5.4 In relation to licensing issues, the procedures followed by the Council's Licensing Committee are set down in detailed guidance documents issued to both the applicant and other interest parties. These are reviewed periodically in the light of experience.
- 5.5 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 responsibility role.

## **6 PREDISPOSITION, PREDETERMINATION AND BIAS**

### **PREDISPOSITION**

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6.1 A distinction is drawn by the Courts between a Councillor having clearly expressed an intention to vote in a particular way before a meeting (pre-determination) and a predisposition to an initial view. Where the Councillor is clear they have an open mind and are willing to listen to all the material considerations presented at the Licensing Committee before deciding on how to exercise their vote, there is no predetermination.

## PREDETERMINATION

6.2 **Predetermination occurs where someone closes their mind to any other possibility beyond that predisposition**, with the effect that they are unable to apply their judgement fully and properly to an issue requiring a decision. The leading case on local authority bias and predetermination acknowledges the difference between Judges sitting judicially and Councillors making decisions in a democratic environment. Given the role of Councillors, there must be 'clear pointers' before predetermination is established. Where there is predetermination, the Councillor should not participate in the consideration of a licensing matter.

6.3 The courts have sought to distinguish between situations which involve predetermination or bias on the one hand and predisposition on the other. The former is indicative of a "closed mind" and likely to leave the Committee's decision susceptible to challenge by Judicial Review. The latter is the perfectly normal process of someone making up their mind.

6.4 The following diagram is produced to help Councillors appreciate the range of circumstances (the following guidance only; any specific questions should be raised with the Council's Monitoring Officer):

Lawful	No view	
	Predisposition	<ul style="list-style-type: none"><li>• Manifesto pledges/commitments</li><li>• Policy making and setting</li></ul>
Unlawful	Predetermination	<ul style="list-style-type: none"><li>• Clearly expressed intention to vote in a particular way on an individual application whatever the information provided</li></ul>
	Bias	<ul style="list-style-type: none"><li>• Membership of an organisation that supports or opposes particular developments or development types</li></ul>

## BIAS

6.5 Councillors should not participate in the consideration of a licensing application if to do so would give the appearance of bias, and the decision may be challenged on the grounds of bias in the Courts. The test for bias is: "Would the fair-minded observer, knowing the background, consider that there was a real possibility of bias?" It is not the Councillor's view of whether they are biased that is relevant but the view of the independent observer. Perception is important and can lead a fair-minded observer to consider that there is a real possibility of bias, they should not participate in making the decision and should withdraw from the room. Further, Councillors do not have to have a Other Registrable or Non-Registrable interest in order to come within the definition of bias. The Courts have held that it is primarily a matter that the Councillor

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should always err on the side of caution. Whilst not every application will raise the question of bias, there will be occasions when a member of the public in possession of all facts might consider that there is a real risk of bias. In these circumstances, the Councillor should seek advice from the Monitoring Officer.

## 6.6 To avoid an appearance of bias:

- no Member sitting on the Licensing and Registration Sub-Committees 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 Committee as an 'interested party' or as the applicant's representative/witness.
- If a Member who sits on the Licensing Committees 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 Committees wishes to represent them then s/he will need to excuse him/herself from the Committee.
- A Member who are part of the Licensing Committee must avoid expressing personal opinions prior to the Committee decision. To do so may 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 relevant licensing legislative and policy framework (including taking account of any relevant national guidance).
- Political group meetings should never be used to decide how any Members on the Licensing Committee should vote. The view of the Local Government and Social Care 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 if they are involved in campaigning on the particular application.
- Other Members (ie those which do not sit on the Licensing Committee) need to be careful when discussing issues relating to matters which may come before the Licensing Committees as this can easily be viewed as bias/pressure and may well open that 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 Any attempt to put pressure on a Licensing Officer from any Member (whether they sit on the Licensing Committee or not) shall be recorded by the Officer and the application referred to the Assistant Director (Corporate Policy and Support).

6.8 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 likely to be put under pressure to represent local 'interested parties' (i.e. 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 applications (unless they have an interest), Members whose Ward includes the application, or whose Ward is likely to be affected by the application, will not sit on the Committees considering the application but s/he may wish to act as/or represent an 'interested party'. In this respect they must observe the same timelines as anyone else seeking to be an 'interested party'. Earlier in this Protocol, there is reference to the same approach as described in this paragraph applying to the Ward represented by the spouse of the Member concerned.

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- 6.9 Bias has been defined as “an attitude of mind which prevents the decision-maker from making an objective determination of the issues that he/she has to resolve”. The importance 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’.
- 6.10 ‘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’. In short, to avoid a claim of determination, you must be able to say with honesty that your mind is open and that you will determine the matter on the evidence, regardless of any pre-disposition that you may have conveyed.

## **PARTICIPATING IN DECISION MAKING**

- 6.11 Councillors are entitled, and are often expected, to have expressed views on licensing issues and that these comments have an added measure of protection under Section 25(2) of the Localism Act 2011. The Section provides that 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:
- 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
  - the matter was relevant to the decision.
- 6.12 The Section makes it clear that if a Councillor has given a view on an issue, this, is considered in isolation, does not show that the Councillor has a closed mind on that issue. So, the mere fact that a Councillor has campaigned on an issue or made public statements about their approach to an item of council business does not prevent that Councillor from being able to participate in discussion of that issue and to vote on it.
- 6.13 However, decision-makers must not fetter their discretion by approaching the decision to determine a licensing application with a closed mind. It is a legal requirement to approach the determination of a licensing application with an open mind to prevent a legal challenge for pre-determination or bias (both being judicial grounds in administrative law).
- 6.14 When Councillors come to make the decision, they:
- are entitled to have and to express their own views on the matter, provided they are prepared to consider their position in the light of all the evidence and arguments;
  - must keep an open mind and hear all of the evidence before them, both the Officers’ presentation of the facts and their advice as well as the arguments from all sides; and

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- must be prepared to change their view right up to the point of making the decision.

6.15 Councillors can listen to applicants and objectors, and indicate their view, but must not be biased in their consideration of their issues. Councillors can support or oppose an application and represent the views of their residents in their role as a Ward Councillor. To do so as a Licensing Committee Member MIGHT compromise their role on the Committee and Councillors are advised to seek advice from the Monitoring Officer.

## 7 OFFICER DISCUSSION & MEETINGS WITH APPLICANTS, OBJECTORS AND INTERESTED PARTIES

7.1 Councillors should refer those who approach them for licensing, procedural or technical advice to Officers.

7.2 Councillors should only attend those meetings organised in accordance with this Protocol and must not attend private meetings with applicants or groups of objectors.

7.3 Where you feel that a formal meeting would be useful in clarifying the issues, you should seek to arrange that meeting yourself through a request to the Corporate Director of Law and Governance or Assistant Director of Corporate Policy and Support to organise it. The Officer(s) will ensure that those present at the meeting are advised from the start that the discussions will not bind the Authority to any particular course of action, that the meeting is properly recorded on the public file at the earliest convenience. In all cases, the involvement of Councillors will be recorded in any subsequent licensing application, whether in any delegated report or in any Committee report.

7.4 **Do otherwise:**

- follow the Authority's rules on lobbying;
- consider whether or not it would be prudent in the circumstances to make notes when contacted; and
- report to the Assistant Director of Corporate Policy and Support or Licensing Manager any significant contact with the applicant and other parties, explaining the nature and purpose of the contacts and your involvement in them, and ensure that this is recorded on the licensing file.

7.5 Discussion between a potential applicant and the Council as Licensing Authority prior to the submission of an application can be considerable to both parties. Such discussions should however only be dealt with by Officers.

7.6 Any pre-application discussions on licensing matters are normally between Officers and either the applicant or interested parties.

7.7 Discussions between the licence applicant and the Licensing Authority 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 of appearance of bias. Accordingly, Licensing and Registration Sub-Committee members should ensure that they do NOT take part in any pre-

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application/pre-decision discussions and that applicants are referred to the Licensing Officer.

## 8 LOBBYING OF/BY COUNCILLORS AND EXPRESSING VIEWS

- 8.1 Although lobbying is a normal and perfectly proper part of the political process, it is **not** acceptable in the case of Members who serve on the Licensing Committee about licensing matters given the “Licensing administrative fairness duty”.
- 8.2 With the possible exception of Ward Councillors who are not involved in the decision-making process, Councillors should avoid organising support for or opposition to a forthcoming licensing decision and should not lobby other Councillors. Councillors who decide to go public in support for a particular outcome will not be able to argue convincingly when it comes to a decision being made on the application that they have maintained an open mind. In such cases, the appropriate course for the Councillor to take is to make a declaration, withdraw from the meeting, and take no part in the decision-making process.
- 8.3 Ward Councillors have an important role to play as representatives of their communities and to bring local information to the decision-making process. Ward Councillors may therefore become involved in discussions with Officers about individual licensing issues. They should however remember that it is very easy to create the impression that they are using their position to influence the outcome.
- 8.4 Lobbying can be oral or by the circulation of letters or documents to all or some Councillors. Problems can occur if Councillors are given information or assurances by, for example, the licensee or applicant, their agents, neighbours, objectors or business colleagues/rivals, which are not part of the formal application or hearing process. Problems can also arise if the information provided to Councillors outside the formal process is misleading or untrue. Furthermore, there is a danger Councillors are manoeuvred into inadvertently confirming or denying confidential information to a third party. In relation to the quasi-judicial processes of the Licensing Committee and the need to conduct certain hearings in private, this action could leave the Council open to legal challenge. Caution may be necessary even after a matter is formally decided, if is subject to legal appeal.
- 8.5 Councillors must not put themselves in a position where they appear to favour a person, company or group. Even a ‘friendly’ private discussion with an interested party could cause others to mistrust the impartiality of Councillors. All Councillors, not just those on the Licensing Committee, should exercise caution in this regard. They should generally avoid any situation where they might be seen to be biased in advance of any official Council Licensing decision, and while not in possession of the full facts.
- 8.6 Specific guidance for Councillors who are also Members of the Licensing Committee is as follows, in relation to external lobbying:

The Member:

- should endeavour to avoid the hearing, and must avoid entering into correspondence over, a case that is being put to them by any interested party outside of the official process for dealing with Licensing matters. It may be necessary to politely interrupt a person trying to raise such an issue.
- should politely point out the reason why the matter must not be heard or considered by them in this situation, asking the person kindly not to continue, and not to raise further points direct with them. If the matter has been raised

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by correspondence, the Member need only pass the letter or email to the Licensing Officer and Officers will respond with the appropriate advice.

- should explain how the matter may be raised in the correct manner, i.e. in writing, to the Licensing Service.

The Member may also:

- provide procedural advice e.g. how to obtain further advice via Licensing Officers, the right to address the Licensing Committee as a deputation, how to make representations, where to obtain advice on appealing a decision, and so on
- should not under any circumstances indicate how they are going to vote, or give any opinion on, or reaction to, the matter being raised.
- should report all such contacts, with the details and any connected correspondence/paperwork, as soon as possible after they have occurred to the Licensing department, so that the incident can be recorded
- should not provide any information on the matter gained by virtue of their position that is not already in the public domain e.g. details from a report that may be heard with the press and public excluded by the Licensing Committee. In any case, where information is requested, best practice is to signpost the enquirer to official where Council sources of information. This avoids any accidentally selective provision of information by the Member, which although well intentioned, could be interpreted as bias
- refer the person to a Councillor who is not a Member of the Licensing Committee e.g. a colleague Ward Councillor, if the interested party is insistent on speaking to a Councillor. If despite the best efforts of the Member in compliance with the above, the person has not desisted as requested, and continues to put forward his/her, view by contacting or making submissions direct to the Member, the Member must:
  - in the absence of any written submission from the person appearing with the official papers at the Licensing Committee hearing, **or**
  - in the event that the official submission from the person is not the same as the information given to the Member
  - declare at the relevant Committee meeting the nature of the lobbying, who with, when, and the content of the issues raised, by whom and when.

8.7 Failure to follow these procedures above could prejudice the proper legal processing of the licensing matter, and this may have serious legal and financial consequences for the Council, also implications for the individual Councillor involved.

## **9 PRE-APPLICATION DISCUSSIONS**

9.1 Any pre-application discussions on licensing matters are normally between Officers and either the applicants or interested parties, not with Members.

9.2 Members will send applicants to the Licensing Officers for pre-applications discussions if approached.

## **10 SITE VISITS**

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10.1 The Council does not do site visits. If one was to happen, it would be under exceptional circumstances with specialist advice given. Councillors are advised not to conduct their own site visits.

## **11 MEETINGS OF THE LICENSING AND REGISTRATION COMMITTEE AND SUB-COMMITTEES**

11.1 Councillors must have the proper information to make an informed decision. An Officer recommendation is not provided in cases where this may prejudice Licensing and Registration Members, who must reach a collective decision based solely on the facts (subject to legal guidance).

11.2 The following information will be included in an Officer report to the Licensing and Registration Committee:-

- A clear description of the issue, application and/or decision required;
- Any relevant history in relation to the matter;
- All relevant evidence (even if apparently conflicting) that will enable Members to reach an informed decision;
- Details of any persons making witness statements and indicating willingness to provide verbal evidence to the Licensing and Registration Committee/Sub-Committees – such persons shall normally be available at the time of the meeting to be called if required, unless some other arrangement is made for the taking of evidence; and
- A list of the options available.

11.3 Details of any persons making representations, (are also given to the Members but may not be contained within the report) together with an advance indication of a wish to address the hearing personally, or through their representative.

11.4 Where a change in policy is being considered the following information will be included:

- Relevant existing requirements and policies.
- An appraisal of the implications of the decision
- An accurate summary of the response to consultation, or if this is to be a decision 'in principle', the recommended consultation that is to be carried out if Members agree.
- An Officer recommendation.

11.5 The majority of reports will be available for public inspection in accordance with the provisions for access to information and freedom of information. Occasionally the Licensing and Registration Committee/Sub-Committees will be asked to hear matters in private with the press and public excluded due to a need to respect personal confidentiality and privacy where sensitive issues are involved. This most often occurs in connection with Public Carriage driver hearings. In these circumstances the papers will not be publicly available in advance of the meeting, and the Licensing and Registration Committee/Sub-Committees will be asked to determine whether the meeting should be held in private to consider the report. Legal advice will be provided where necessary to assist with this decision.

## **COUNCILLOR ATTENDANCE**

11.6 It is important that the Councillors' decision takes account of all material issues, not solely those contained in the Officers' report, but also those which may be legally

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permitted to be presented orally or otherwise at the meeting. Any Councillor absent from any part of the meeting during consideration of a report must not vote on that matter.

## **MAKING REPRESENTATION ON LICENSING APPLICATIONS**

- 11.7 Members of the Licensing and Registration Committee/Sub-Committees may from time to time make representations on licensing applications. In these circumstances they are required to make their comments in writing and will also be afforded the opportunity to present their view at the appropriate meeting of the Licensing and Registration Committee/Sub-Committee. They may not participate in any part of the determination process.

## **PUBLIC SPEAKING AT COMMITTEE MEETINGS**

- 11.8 Where applications are considered pursuant to the Licensing Act 2003 or the Gambling Act 2005, by the Licensing and Registration Committee/Sub-Committees, the conduct of the meeting will be governed by the appropriate Hearings Regulations. The right to make representations under these Acts and Regulations is accordingly limited.
- 11.9 Consideration of applications for drivers of public carriages are held in closed sessions due to the sensitive nature.

## **DEFERMENT**

- 11.10 The Licensing and Registration Committee/Sub-Committees should only defer a decision where there are clear and legally permissible reasons for doing so.

## **12 RIGHT TO FAIR DETERMINATION & OPEN AND FAIR HEARING**

- 12.1 It is important that all the Licensing and Registration Committee/Sub-Committee Members read all of the agenda papers prior to each meeting and listen to all points raised during those meetings. Members have a duty to take into account all relevant matters, including licensing advice, and to ignore irrelevant matters. Members should present during the whole discussion of an item, or they should take no further part in the debate and should not vote on that item. Infrequently, certain applications may be adjourned at meetings for site visits etc and it is important that the same Members attend the subsequent meeting in order to determine the application.
- 12.2 Councillors, and Members of the Licensing and Registration Committee/Sub-Committees in particular, need to take account of the public's expectation that a licensing matter will be processed and determined in an open and fair manner, in which the Members taking the decision will take account of all of the relevant evidence presented before arriving at a decision, and that committing themselves one way or another before hearing all the arguments makes them vulnerable to an accusation of partiality. Determination of a licensing matter is a formal and fair administrative process involving the following rules and procedures, including the rules of natural justice, and is subject to rights of appeal and an expectation that people will act reasonably and fairly. There is an added possibility that an aggrieved party may seek judicial review of the way in which a decision has been arrived at; or complain to the Ombudsman on the grounds of maladministration; or that a Member has breached the local Code of Conduct.
- 12.3 Councillors on the Licensing and Registration Committee/Sub-Committees must therefore not organise or get involved in organising support for the opposition to a

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licence application and must not lobby other Licensing and Registration Committee/Sub-Committee Councillors on a particular matter. Such actions can easily be misunderstood by parties to an application and by the general public and leave Committee Members and the Committee's decision open to attack.

- 12.4 A Councillor who does not sit on the Licensing and Registration Committee/Sub-Committee may wish to express an opinion and decide that a particular licensing issue is of such importance that he or she wishes to actively campaign either for or against the application in question. This would typically be in respect of a high-profile issue within the Ward which the Member represents. This is a legitimate political position for a Member to take, but in such special circumstances it would be impossible for that Member to be seen to remain impartial. Councillors not involved in the determination of a licensing matter may attend the public element of its hearing. Their status as a Councillor does not enable them to make any representations on licensing matters not available to members of the public. In line with any rights available to members of the public they may however make representations on licensing matters in accordance with the procedures approved by the Licensing and Registration Committee. A Member with a Disclosable Pecuniary Interest may not attend even in a private capacity and sit in the public gallery of any meeting of the Council, including one involved in the determination of a licensing matter.
- 12.5 A Member of the Licensing and Registration Committee that is to determine a licensing matter must not campaign for or against it prior to it being considered otherwise a challenge could be made for bias. If a Member of the Committee that is to determine a licensing matter feels that they must express an opinion on licensing matters before they are determined their continued membership of the Committee would not be possible having regard to their Licensing administrative fairness duty.
- 12.6 Members are entitled to hold a particular view for or against a particular decision and this is known as a predisposition, but they must still be able to consider and weigh relevant factors before reaching the final decision at a Committee meeting.
- 12.7 Section 25 of the Localism Act 2011 has sought to clarify the law regarding allegations that a decision is affected by bias or predetermination. Section 25 states that:
- “a decision maker is not to have had, or 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 that matter, and
  - (b) the matter was relevant to the decision.”
- 12.8 Whilst Section 25 provides some comfort to Member on the extent to which they are entitled to express firm views on matters before decisions are made it is still the case that Members must retain an open mind at the time the decision is made and be prepared to listen to and consider the arguments, together with any advice or information from Officers, at the Committee meeting before finally making up their mind on how to vote.
- 12.9 Given the formal hearings nature of licensing matters and the licensing administrative fairness duty. Members of the Licensing and Registration Committee should not participate in any discussion on the merits or otherwise of particular cases including whether or not to grant or refuse any application. There should be no discussions at political group meetings to decide how Members will vote; this includes any pre-

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committee meeting or discussions between Licensing and Registration Committee members of a political group.

- 12.10 The fundamental principle is that a Member on a Committee determining a licensing matter must both:-
- (a) have an open mind; and
  - (b) be capable of being seen by an objective and reasonable third party as having an open mind.
- 12.11 A Member of the Licensing and Registration Committee can pass on the views of a resident to the appropriate Officer prior to its hearing, but the Member must be careful not to be seen to be an advocate trying to influence the decision in any way on behalf of the resident. It would be inappropriate for the Member to pass on the views to a Member involved in the determination of the licensing matter.
- 12.12 Even if a Member of the Licensing and Registration Committee has not expressed a view on a licensing matter, if their mind is closed the Member should not participate in the hearing/determination of the matter. In these circumstances, another Member of the Committee or a substitute may attend to replace the Member (subject to the rules permitting or preventing such replacements and to them having undertaken the required training). It is not possible for a Member merely to act as a replacement for part of the meeting only while a particular licensing matter is determined. Any replacement Member must accept all of the principles set out in this guidance, including the need to have an open mind. In other words, the Member has declared an interest must not give an instruction or even an indication to the replacement Member on how that Member should vote. In addition, the Member should not seek or be seen to seek to influence the decision in any way, otherwise the integrity of the licensing processes would be damaged.
- 12.13 A Member should declare a Disclosable Pecuniary Interest if they are the partner of the applicant. Normally for the purposes of the Code of Conduct a Member can participate in and vote on an item having local interest where, for example, the applicant is a close associate or another family member. However, owing to the particular responsibilities of Licensing and Registration Members in respect of the licensing administrative fairness duty a Member with a local interest should not only disclose it but also should not participate in in and determine that application:
- A Member who is or has been regular customer of an applicant licensee or a former licence holder who would not even have any local interest should nevertheless not participate in the determination of that application
  - A Member who has had any previous dealings regarding the premises should consider very carefully before they decide it is appropriate for them to participate in the determination of an application.
- 12.14 Ward Councillors are able to attend a Committee hearing as a party provided that they have submitted valid representation in advance and, therefore, they would have the same legal rights in this respect as any other person. They would have no other right to attend and speak at a meeting.
- 12.15 At no time should Councillors put pressure on Officers for a particular recommendation. Discussions between Councillors and Licensing Officers is beneficial and to be

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encouraged but should be only for the exchange of information and personal/professional views.

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