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Our Ref: BL/MP/007638/13

Your Ref: DB/JB00070103130007

01 May 2013

Councillor David Burbage
Leader,
Royal Borough of Windsor and Maidenhead
Town Hall, St Ives Road
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Dear David

PREDETERMINATION, BIAS AND ADVICE FROM MONITORING OFFICERS

Thank you for your letter seeking my views on an advice notes from Monitoring Officers to councillors, and how this interacts with the Localism Act. Whilst Ministers cannot give formal legal advice (on advice), I am happy to provide my informal view.

Under the last Administration, the Standards Board regime undermined freedom of speech in local government. This was compounded by a further gold-plating of pre-determination rules, fuelled by misconceptions about the flawed regime, going far beyond what was reasonable or legally necessary.

The Localism Act 2011 has abolished the Standards Board regime, and has also clarified the position with regard to pre-determination and bias. Section 25 clarifies that a councillor is not to be regarded as being unable to act fairly or without bias if they participate in a decision on a matter simply because they have previously expressed a view or campaigned on it. The effect is that councillors may campaign and represent their constituents – and then speak and vote on those issues – without fear of breaking the rules on pre-determination.

In this context, I feel that blanket advice which states that councillors cannot participate in a meeting purely because there is merely a 'perception of bias' or 'risk of bias' is potentially wrong. It will, of course, depend on the individual circumstances, but the flexibilities and freedoms laid out in Section 25 may apply.

It is worth drawing a distinction between **pre-determination** and **pre-disposition**. Councillors should not have a closed mind when they make a decision, as decisions taken by those with pre-determined views are vulnerable to successful legal challenge.¹

¹ Incidentally, where a councillor has a predetermined view because of having a disclosable pecuniary interest in an item of council business, our guide for councillors makes clear that they may not participate in any discussion or vote and that they should leave the room if their continued presence is incompatible with their council's code of conduct or the Seven Principles of Public Life.

However, before the meeting, councillors may legitimately be publicly pre-disposed to take a particular stance. This can include, for example, previously stated political views or manifesto commitments.

At the decision-making meeting, councillors should carefully consider all the evidence that is put before them and must be prepared to modify or change their initial view in the light of the arguments and evidence presented. Then they must make their final decision at the meeting with an open mind based on all the evidence. Such a fair hearing is particularly important on quasi-judicial matters, like planning or licensing.

More broadly, monitoring officers can offer advice to councillors. But the final decision about whether it is right to participate in discussion or voting remains one for elected members. Councillors should take decisions with full consciousness of the consequences of their actions. I hope the Localism Act has injected some common sense whilst allowing for genuine debate, freedom of speech and democratic representation.

I hope this is of assistance. Further to your suggestion in your original letter, I am placing this letter on my department's website in case it may assist councillors in other local authorities.

BRANDON LEWIS MP