

12. Code of Practice for Members and Officers Dealing with Licensing Matters

The Need for Guidance

This code has been written to help everyone understand the standards required of the Isle of Wight Council in carrying out its licensing functions.

This code applies to all Isle of Wight Council members and staff involved in the licensing system. It applies equally to the operation of the Licensing Committee and its sub-committees when exercising licensing functions, and the Cabinet and the Full Council in their policy formation functions.

Licensing decision-making relies on informed judgment within a firm policy context. It is also highly contentious because decisions can affect the daily lives of everyone and the private interests of individuals, applicants and residents. This is heightened by the openness of the system, in that it actively invites public opinion on certain licensing functions before taking decisions. It is important, therefore, that the process is characterised by open and transparent decision-making.

The aim of this code is to ensure that the council operates an open and fair system. Failure to follow this code, without good reason, could be taken into account during investigations into possible maladministration or by the courts in considering any appeal.

Councillors and staff are required to read this code thoroughly and put it into practice consistently. It is intended to review the code regularly so that it remains useful and relevant. If any points are unclear or need review, please contact the Monitoring Officer.

General Role and Conduct of Members and Officers

Members and officers have different, but complementary, roles. Both serve the public, but members are responsible to the electorate, while officers are responsible to the council as a whole. A successful relationship between members and officers is based upon mutual trust and understanding of each other's position. This relationship, and the trust which underpins it, must never be abused or compromised.

Applicants and the public are entitled to expect high standards of conduct and probity by all people holding public office and, in particular, when dealing with licensing matters. Only material licensing considerations should be taken into account. There are statutory provisions and a code setting standard, which must be followed.

Both members and officers are guided by the codes of conduct contained in the Constitution. The Member Code of Conduct provides guidance and standards for members. Members should not favour any individuals or groups and, although they may be influenced by the opinions of others, they alone have the responsibility to decide what view to take.

A further key principle is that local opposition or support for a proposal is not in itself a ground for refusing or granting a licence, unless that opposition or support is based upon valid reasons and concerns which can be sustained.

Training

Following council elections, and at intervals thereafter, a range of training seminars are held for members. Guidance is given on the Member Code of Conduct and on licensing matters. No

member may sit on the Licensing Committee or its sub-committees until they have attended the relevant training sessions on licensing matters and the Code of Conduct.

Declaration and Registration of Interests

The law and the codes of conduct set out requirements and guidance for members and officers on declaring interests and the consequences of having such interests.

In summary, the code requires (where members have a conflict of interests) that if the matter to be considered affects:

(a) An item in the members register of interests then a Disclosable Pecuniary Interest must be declared, and the member must not take part in the consideration of the item, and must leave the room. Members with such an interest may have the same participation rights as a member of the public only if a dispensation has been granted, but must leave the room after they have done so. To speak as a member of the public, members must, in addition to having obtained a dispensation, have made a relevant representation during the consultation period in order to speak.

(b) If a member has a close personal interest in an item (say an application submitted by a close family member or a close associate), which is so close that it could give rise to actual or apparent impartiality, bias or pre-determination, then they should declare this interest and leave the room during its consideration. Again, members with such an interest may have the same participation rights as a member of the public if a dispensation has been granted. To speak as a member of the public members must, in addition to having obtained a dispensation, have made a relevant representation during the consultation period in order to speak.

Members who have substantial licensing interests, or other interests, which would prevent them from voting on a regular basis, should avoid serving on Licensing Committee or its sub-committees.

Further advice on these matters is available from the Monitoring Officer.

Licensing Proposals Submitted by Members and Officers

All Licensing Services officers and other officers involved in licensing matters shall declare to their head of service any interest which they may have in any third party application (e.g. an application submitted in their immediate neighborhood or by a society or club of which they are a member) and take no part in the determination of that application.

Where a licensing application is made by a Licensing Services officer, or any other officers involved in the licensing process (including members of their close family or close associates), that officer shall play no part in the decision making process. Similar to members, the officers shall not take any part in the committee process if their application is referred to committee and must, if they are present, withdraw from the chamber or public gallery.

At the meeting of the Licensing Committee or one of its sub-committees to which an application submitted by a member of the Isle of Wight Council is being considered, that member should neither vote nor speak on the application during the debate and should withdraw from the meeting. The opportunity to present a case to the committee to the same degree as a member of public will be available subject to a dispensation being granted in certain circumstances (see Part 5 Section 4 paragraph 8 and Part 5 Section 6).

All members of the council who may be considering the submission of an application are strongly advised to employ the services of an agent to avoid partiality or the perception of partiality, to ensure proper contact with officers during its processing and to address the committee as appropriate.

Lobbying of Members and Lobbying by Members

Licensing decisions must be taken objectively on the basis of relevant information.

Where the Licensing Committee or one of its sub-committees are taking the decision all, and only, relevant information must be presented either in writing or orally to the committee meeting.

It is perfectly proper for elected councillors to give applicants and objector's factual information about the process but, other than this, contact with applicants or objectors should be treated very carefully. In particular, members who wish to participate in taking a decision must never express an unequivocal opinion about the merits of an application.

Whilst it will usually be preferable for members to avoid debating future decisions, particularly in public forums, they may occasionally wish to do so. When this happens, they should use a form of words that confirms that whilst they may have a pre-disposition towards a particular outcome, they have not made a pre-determination on the subject, such as *"on the basis of the information I have at the moment I am likely to oppose/support the application, but I will consider all the information available before I make my decision"*. Any Member who makes a stronger statement, such as *"this application will be passed over my dead body"* will not be able to take part in the decision made by the committee.

Members may be lobbied by individuals, groups or other interested parties in a matter, and this is to be expected. However, if a member considers that they are receiving unduly intense or inappropriate lobbying, then they can discuss this with the Strategic Manager for Regulatory and Community Safety Services for further advice.

Members should be particularly careful not to exert pressure on an officer who has to make a recommendation to the Licensing Committee or one of its sub-committees. If any officer believes that pressure is being exerted upon them, they will immediately notify the Strategic Manager for Regulatory and Community Safety Services and/or the Monitoring Officer. In the event that the Strategic Manager for Regulatory and Community Safety Services believes that pressure is being exerted upon their role, they should immediately notify the Director and/or the Monitoring Officer.

Officers may take many licensing decisions under delegated powers. It is similarly unacceptable for those officers to be lobbied by members or be subjected to undue pressure.

Bias/Apparent Bias

Any member who is, or appears, biased towards an issue can leave the decision vulnerable to challenge in the courts. The courts will undertake a detailed investigation of a member's conduct over a period rather than just look at the circumstances relating to that decision itself. It is therefore extremely important that members are well aware of what they should and should not do to avoid having decisions undermined by later challenges. There must be an appearance of impartiality at all material times.

The test for bias applied by the courts in terms of a particular member who participates in the decision-making itself is as follows:

“Would a fair minded observer knowing the background, consider there was a real possibility of bias arising from a particular member being a member of the relevant decision making body.”

In recent years the courts have been more willing to find that there has been an appearance of bias:

“Whether, from the point of view of the fair minded and informed observer there was a real possibility that the Licensing Committee or one of its sub-committees or some of its members were biased in the sense of approaching the decision with a closed mind and without impartial consideration of the licensing issues.”

The court will look at the facts in each case. If a member has simply given a view on an issue, this will not amount to pre-determination so as to render the decision vulnerable to legal challenge, as this alone does not show that the member has a closed mind on that issue. Simply due to a member making a public statement about their approach to a licensing matter does not mean that the member cannot participate in the determination of the application.

However, members must be careful to articulate how they phrase statements made. Expressing a view may not disqualify a member on the basis of bias or the Member Code of Conduct, but they must be able to show that they have not approached the matter with a “closed mind”. Merely asserting that the member had an open-mind will be of little value – they do not relate to the all-important impression portrayed.

Once the bias or predetermination is demonstrated, the decision will be quashed unless there is good reason for the court to exercise its discretion not to do so. It is no answer to suggest that only one member was “guilty” and therefore the decision should stand.

In light of the above, and the obvious issues this raises, the following further guidance is given:

Members of the Licensing Committee attending public meetings should avoid expressing opinions on any current or live licensing matter nor participate in any debate. They must adhere to stating facts only or declare that they are there to listen to other views.

In respect of pending/forthcoming applications (pre-application discussions), members of the Licensing Committee, or local councillors who wish to take part in the debate, should have regard to this code and may take the view that they should not attend/participate in any discussion/public meeting if they wish to take part in the debate and vote on an application.

Members who are not members of the Licensing Committee, and who do not intend to participate in the debate as local councillors, do not need to avoid discussions/meetings, but must at all times have regard to the Member Code of Conduct (see Part 5 Section 4).

Parish and Town Councils

The danger of prejudging an issue arises not just at public meetings but also in parish and town council debates. Taking part in a parish or town council debate does not prevent members from taking decisions at the Licensing Committee or one of its sub-committees or other members from participating in the debate. However, parish and town councils do not have the advantage of licensing advice nor complete information on any application. Contributions by elected councillors at parish or town councils must therefore be carefully worded to avoid evidence of the decision having been prejudged.

When a member has participated in a public debate, at a parish/town council or elsewhere, they should declare this when they speak at the Licensing Committee or one of its sub-committees and should make a clear statement that they have not prejudged the issue.

Whipping

The use of party political whips in licensing decisions would demonstrate a predetermined position and could also be maladministration. Whipping must not therefore take place.

Individual members should reach their own conclusions on licensing matters rather than follow the lead of another Member. However, the views of other members of the committee, where they are relevant, can be one of the factors taken into account when taking a decision.

Pre-Application and Discussion Prior to Committee Meetings

Discussions between a potential applicant and officers of the council prior to the submission of an application and/or prior to a committee meeting can be of considerable benefit to both parties. Discussions can take place for a variety of reasons, for example to overcome relevant representations submitted by a responsible authority or other persons.

It should always be made clear at the outset that discussions prior to applications and discussions prior to committee meetings will not bind the council to making a particular decision, and that any views expressed are provisional, until all relevant information is submitted and consultations on it have taken place.

Advice should be consistent and based on national and local policies and relevant legislation. There should be no significant difference of interpretation of licensing policies between licensing officers. All officers taking part in such discussion should make it clear whether or not they are the decision maker. Licensing officers will ensure their advice is impartial and is seen to be. A written note should be made of all discussions.

When attending public meetings and site visits, members should take great care to maintain their impartiality, listen to all points of view and not state a conclusive decision on any proposal or submitted licensing application. Members of the committee should not make unaccompanied “unofficial” site visits in connection with pre-submission discussions, the determination of current applications or familiarisation visits.

It is preferable that members do not take part in pre-application discussions, so as to maintain impartiality and avoid apparent bias arising. Where members do become involved in such discussions, including meetings on site, they must seek the assistance and attendance of a licensing officer. If any contact is made in the absence of officers, a written note of any discussions between the member and the applicant and/or their agent should be sent to the Strategic Manager for Regulatory and Community Safety Services so that it may be placed on the file.

Officer Reports to Committee or Sub Committee

The reports will give comprehensive detail and a clear explanation of the location, the relevant licensing history, the policies and any other material considerations. Where lawful, reports will identify a range of options which the Licensing Committee or a sub-committee may choose.

Decisions

A member shall not be able to vote in relation to any licensing application unless they have been present at the meeting of the Licensing Committee or its sub-committee throughout the consideration of that particular application.

All decisions should be properly recorded and the reasons for all decisions should be clear.

Sanctions

Elected councillors who act in breach of this code risk being the subject of a complaint to the Monitoring Officer.

Breaches of the council procedure rules, particularly the Regulatory Committee rules, may invalidate a decision leaving that decision vulnerable to challenge on appeal, through judicial review or criticism by the Local Government and Social Care Ombudsman.

Officers who act in breach of this code of practice may be in breach of their contract of employment and subject to disciplinary or capability procedures.