PRIVATE AND CONFIDENTIAL

Isle of Wight Council
Governance Advice

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1 Background

1.1 The Isle of Wight Council ("the Council") is also the local planning authority ("LPA") for the Island

1.2 Various issues (set out in the detail of this advice) arose in relation to the determination of a planning application relating to the meeting of the Council's Planning Committee specifically around predetermination and site visits.

2 The Review

2.1 The Chief Executive of the Council instructed VWV LLP to provide governance advice to him on the issues as set out in this report. The advice was to be provided following a desktop review of materials supplied by the Chief Executive.

2.2 VWV are a full service law firm with a specialism in public sector legal advice for over 25 years. The advice was provided by Mark Heath.

2.3 Mark Heath has over 30 years of service within the public sector. Until December 2016, he worked at Southampton City Council. At Southampton, he was Solicitor to the Council (and Monitoring Officer) for 20 years. Subsequent to that he held the positions of Director of Place and subsequently Chief Operating Officer. His legal experience includes drafting and reviewing constitutions, advising on standards and all aspects of local authority governance and decision making.

2.4 The Chief Executive sought advice on whether appropriate and lawful decisions were reached by the planning committee determining the West Acre Farm Application with reference to three specific issues:

2.4.1 the Chair of the Planning Committee not being involved due to predetermination;

2.4.2 Involvement in decision making at the Planning Committee after partial attendance at a site visit; and

2.4.3 two members who may have predetermined and received advice from the Deputy Monitoring Officer.

2.5 The Council also sought advice on how the Council could manage or mitigate against any similar circumstances arising in the future.

2.6 For the avoidance of doubt, any findings within this report do not amount to the making of findings in respect of any formal processes which relate to either employees or members of the Council. The Council has its own disciplinary processes for officers and code of conduct processes for members should it, having considered the comments of this report and taken appropriate advice, decide to invoke them.

2.7 We have used our judgement and experience to reach the conclusions and recommendations in this report, based on the evidence we were supplied with.

2.8 Prior to publication, we sent a copy of this report to the Chief Executive in confidence, to check for factual inaccuracies and have corrected those only.

2.9 We have addressed each of the issues individually, although there is some overlap between them. We added a number of additional points that are by their nature more general comments in relation to the situation as we perceive it.

3 Decision-Making

3.1 Our advice touches to some extent on the decision making regime. It also raises issues around possible grounds for legal challenges of decisions made by councils. For that reason, and to avoid repetition, we summarise the key aspects in so far as they are relevant.

3.2 The Localism Act 2011 amended the Local Government Act 2000 (LGA 2000) (Parts 1A and Schedule A1) making changes to local authority governance arrangements in England.

3.3 Models of governance

3.3.1 Schedule 2 to the Localism Act 2011 prescribes the following forms of governance:

(a) Executive arrangements. This can be a leader and cabinet executive (England) or a mayor and cabinet executive.

(b) A committee system. This operates its decision-making process in accordance with sections 101 and 102 of the Local Government Act 1972.

(c) Prescribed arrangements. As made by the Secretary of State in regulations. (Paragraph 9B, Schedule 2, Localism Act 2011.)

(d) Paragraph 9H of Schedule 2 to the Localism Act 2011 also provides for a new system of directly-elected mayors

3.4 Executive arrangements

3.4.1 A council which has adopted executive arrangements must ensure that its executive takes the form specified in section 9C(2) of Schedule 2 to the Localism Act 2011. The executive is responsible for certain functions and there must be a division between the making of a decision by the executive and the scrutiny of that decision.

3.5 Functions

3.5.1 The functions of the executive are set out in sections 9D and 9DA of the LGA 2000 and regulations made thereunder. The regulations specify functions not to be the responsibility of the executive. As a consequence, there is a presumption that all functions not so specified will be the responsibility of the executive, rather than the full council (section 9D(2), LGA 2000).

3.5.2 Those functions not so specified are non-executive functions. This includes planning.

3.5.3 Non-executive functions such as planning tend to be determined by a committee (the planning committee at the Council) or by officers in accordance with the scheme of delegation contained in the Council's Constitution.

3.6 Local authority constitutions

3.6.1 Every local authority is required to prepare and keep up-to-date a constitution. This must also be made publically available at its offices (and is also often on council's websites).

3.6.2 The constitution must contain:

(a) its standing orders;

(b) its code of conduct;

(c) any information directed by the Secretary of State;

(d) any other information considered appropriate by the local authority; and

(e) in the case of a local authority operating the committee system the constitution must also contain a statement as to whether it has an overview and scrutiny committee (OSC). (Section 9P, LGA 2000.)

3.6.3 In 2000, the Secretary of State for the Environment, Transport and the Regions issued the Local Government Act 2000 (Constitutions) (England) Direction 2000 (the Direction). The Direction included that the constitution of a local authority in England must include '...a description of the rules and procedures for the management of its financial, contractual and legal affairs including:

(a) procedures for auditing of the local authority;

(b) the local authority's financial rules or regulations or such equivalent provisions as the local authority may have in place whether specified in the authority's standing orders or otherwise;

(c) rules, regulations and procedures in respect of contracts and procurement including authentication of documents whether specified in the authority's standing orders or otherwise; and

(d) rules and procedures in respect of legal proceedings brought by and against the local authority...'

3.7 Planning Committees

3.7.1 A local planning authority (LPA) is the local government body that is empowered by law to exercise urban planning functions for a particular area. For the Isle of Wight that is the Council.

3.7.2 An LPA may discharge its decision-making functions through a committee, sub-committee, LPA officer or any other local authority, provided no conflict of interest arises. A conflict may arise where for example an LPA's own application for development is involved.

3.7.3 Outside of these requirements, whether a particular type of decision is determined by committee or by a planning officer will be governed by the LPA's constitution or standing orders. Minor planning applications are usually decided by a senior planning officer at the LPA. For more major applications, the planning officer recommends a decision to a planning committee, made up of elected councillors, who vote on the planning application having considered the officer's report. The public can attend committee meetings and may be entitled to speak. The committee will usually delegate power to the planning officer to grant or refuse the planning permission, often subject to completion of an agreement under TCPA 1990, s 106.

3.7.4 In dealing with an application for planning permission or permission in principle, the decision-maker must have regard to:

(a) the provisions of the development plan, so far as material to the application

(b) any local finance considerations, so far as material to the application, and

(c) any other material considerations

3.8 Decision-making

3.8.1 Standing orders

(a) A local authority has a statutory power to make discretionary standing orders which will form part of the Council's Constitution:

(i) for the regulation of any committee of a local authority or joint committee of two or more local authorities in relation to its proceedings and business; and

(ii) regarding the minimum number of members (quorum) who must be present, convening meetings, proceedings and the place of meetings of their committee and sub-committees (Section 106, LGA 1972).

(b) Standing orders can be made to regulate the conduct of business at local authority meetings. For example, a local authority could make a standing order dealing with notices of motions to council, including motions that may be moved without notice (for example, extending the time limit on speeches or to exclude the public during consideration of confidential business)

(c) Standing orders are made by resolution. The primary aim is to ensure that local authorities use fair and transparent decision-making processes and can be held to account. The consequences of a local authority failing to follow its own standing orders can be serious.

3.8.2 Public rights of appeal

(a) The LGA 1972 and LAR 2012 do not expressly provide relief for instances where a local authority does not comply with its statutory obligations or fails to follow its own standing orders in relation to meetings. They also do not contain any internal enforcement mechanisms with rights of appeal to designated officers.

(b) Therefore, individuals who consider that a local authority has not complied with its statutory obligations may wish to obtain redress through the following methods:

(i) political support through a councillor or a letter of complaint to the local authority;

(ii) having exhausted a local authority's complaints procedure, a complaint to the Local Government Ombudsman; and

(iii) judicial review.

3.9 **Decision-making and avoiding legal challenge**

3.9.1 Decision-making; the context

(a) Councils make many decisions every day which affect the lives of individuals, groups of citizens and industry. The law sets down parameters within which such decisions should be made. The overall purpose of this is simple: to avoid the state and its agencies wielding power in an arbitrary way. Most decisions are capable of challenge by way of an appeal mechanism and, failing that, judicial review.

(b) Challenge and The Ultra Vires Principle

(i) Should a local authority exceed the statutory powers expressly or impliedly given by parliament its actions will be ultra vires and can be challenged by way of judicial review in the High Court. The review is not so much concerned with the merits of the case but with whether the decision is one which the authority could legally make. The effect of a successful judicial review is that the public authority is prevented from taking a decision, or taking it in a particular way, or that a decision already made is quashed or declared invalid. Judicial review must be distinguished from an appeal, which is available only when specifically provided for, and in which the appeal court or tribunal can substitute its decision for that of the body appealed from.

(ii) A convenient classification of the legal grounds on which judicial review may be sought was given by Lord Diplock in the GCHQ case (Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374) where his Lordship identified three categories of challenge that a decision was ultra vires – illegality, irrationality and procedural impropriety.

(iii) The principles of ultra vires are flexible as well as complex. The categories of challenge are used for convenience of analysis. They do not form rigid compartments and there is considerable overlap. The flexibility of the ultra vires principles and the discretionary nature of the remedies mean that a court will have a considerable degree of latitude in deciding whether a local authority has acted unlawfully and if so whether a legal remedy is to be issued.

(iv) Illegality

(A) A decision may be challenged for illegality where, due to an error of law, the local authority did not have legal authority for the decision made. There may have been a lack of jurisdiction, an absence of evidence to support the decision, a fettering of the exercise of a discretionary power, the exercise of a power for an improper purpose or the taking into account of irrelevant considerations.

(v) Unreasonableness and Irrationality

(A) Beyond the matters already outlined, although often intertwined with them, a separate and distinct ground of invalidity exists that has become known as 'Wednesbury unreasonable': 'an authority may come to a conclusion so unreasonable that no reasonable authority could ever come to it ... but to prove a case of that kind would require something overwhelming' (Lord Greene MR in Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1KB 223). More than ordinary negligence, there must be 'something overwhelming'.

(B) There is some debate as to whether 'irrationality' adds anything to 'unreasonableness' but whatever term is preferred, the test remains stiff. The emphasis is still on the perverse, the absurd, the bloody-minded or the pig-headed.

(vi) Procedural Fairness

(A) The notion of procedural fairness in relation to the activities of public authorities is contained in the common law rules of natural justice. The rules of natural justice embody the right to be heard before a decision is taken (*audi alteram partem*) and an absence of bias in the decision maker (*nemo judex in causa sua*).

(B) Apart from unfair procedure (breach of the rules of natural justice) there are many other forms of potential procedural irregularity. Particular aspects of procedural irregularity have been recognised over the years. First, the body or person taking a decision must have been properly constituted or appointed. This will depend upon the interpretation of the relevant statutory provisions. A second aspect of procedural irregularity is improper delegation of authority (*delegatus non potest delegare*). This is one of the most important principles contained within the ultra vires doctrine and requires that a discretionary power is to be exercised only by the person or body properly authorised

3.10 **Legal requirements**

3.10.1 Declaration of interests

(a) Public bodies should make decisions dispassionately according to the law and the materials before them. It is important that decision-makers have no personal interest in the subject on which they are adjudicating.

(b) It is a fundamental principle of law that a decision-maker should not be a "judge in his own cause". This principle applies to all public decision-makers.

(c) Although a close connection with the subject of the decision will automatically disqualify a person from making a decision, declaration of a less direct interest before a decision is made may permit them to take part.

3.10.2 Following correct procedure

(a) A decision-maker will frequently be required to follow a set procedure for making its decisions. This may take the form of procedural requirements set out in statute, statutory instrument, guidance (whether statutory or non-statutory) or a procedure, which the decision-maker has set for itself. Any such procedures are usually drafted with the purpose not only of guaranteeing that the decision-maker takes into account all relevant considerations, but also to ensure procedural fairness for those affected by the decision it is required to make. In R (Boyejo) v Barnet London Borough Council [2009] EWHC 3261 (Admin), the High Court quashed decisions taken by Barnet Council and Portsmouth City Council since they had failed to bring their duties under the Disability Discrimination Act 1995 to the attention of the decision-makers.

(b) Also in R (Rahman) v Birmingham City Council [2011] EWHC 944 (Admin), the High Court granted a declaration that the council's decisions in November 2010 and March 2011 to terminate funding to three voluntary organisations providing legal entitlement advice were unlawful, as they were taken without due regard to the race and disability public sector equality duties

under section 71 of the Race Relations Act 1976 and section 49A of the Disability Discrimination Act 1995.

(c) The High Court in R (South Tyneside Care Home Owners Association and others) v South Tyneside Council [2013] EWHC 1827 (Admin) quashed the local authority's decision as to the level of fees that it would pay its care home providers. It did so on the basis that the decision was unlawful, procedurally unfair and/or Wednesbury unreasonable.

(d) Departure from an established prescribed procedure can give rise to a successful legal challenge, for example, by way of judicial review, even if no unfairness results:

> *"… susceptibility to judicial review under this head [procedural impropriety] covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice"* (Lord Diplock in Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374 (at 411A-B)).

(e) While it is necessary for a public body making decisions to follow a set procedure, doing so does not necessarily render its procedure fair. For example, where notice has been properly served on an affected person and they have indicated an intention to serve written representations outside the prescribed timescale, fairness may require the body to adjourn to allow them to do so, even though an express rule setting out requirements of service would permit it to proceed if representations have not been received within the specified timescale.

3.10.3 Consultation

(a) Public bodies including local authorities are required by law to consult before making decisions, particularly in the context of making policies or issuing guidance.

3.10.4 Within remit

(a) It is a fundamental principle of administrative law that a public body may only do what it is empowered or required to do by statute, whether expressly or by necessary implication.

(b) This means that a public body must make decisions that lie within the requirements of its governing legislation. Equally, if the decision-makers have a duty to perform in determining a question, they must not evade their duty. Doing otherwise would render their decision ultra vires and void.

3.10.5 Rational and evidence-based

(a) Whether a public body has a duty or discretion to exercise in making its decision, that decision must be rational.

(b) An irrational or unreasonable decision is one that was not reasonably open to it, as stated by Lord Green MR in the Associated Provincial Picture Houses v Wednesbury Corporation [1948] 1 KB 223.

(c) Decision-makers are given a degree of latitude by the courts when challenged by way of judicial review on grounds of unreasonableness. The courts recognise that the decision was for the public body to make, not the court, and so they are reluctant to interfere where they might disagree with a decision but it is objectively rational.

(d) One way that a public body can ensure that its decisions are objectively reasonable is to ensure they are evidence-based

(e) Those making decisions in the public interest should not do so arbitrarily or on the basis of personal feeling. They should look at the available information and evidence and reach a considered view in light of their powers and duties. It does not matter if another person looking at the same material might have reached another decision. What matters is that the decision-maker can be shown, objectively, to have taken the material into account and reached its own conclusion based on the evidence

3.10.6 All relevant considerations

(a) One aspect of reaching a rational and evidence-based decision is taking all relevant factors or considerations into account. This was made clear by the House of Lords in Anisminic v Foreign Compensation Commission [1969] AC 147 (confirmed in Lumba v Secretary of State for the Home Department [2012] 1AC 245, paragraph 66), and by Lightman J in R v Director General of Telecommunications, ex parte Cellcom Ltd [1999] COD 105:

> *"The Court may interfere if the Director has taken into account an irrelevant consideration or has failed to take into account a relevant consideration".*

(b) This does not mean that a decision-maker must consider all material, but it should have as much information as possible, that is relevant to the decision that it is about to make. Deciding what is relevant depends on the subject matter of the decision, but examples include:

(i) the proposal;

(ii) responses to consultation or written representations received;

(iii) guidance on parameters for the decision;

(iv) cost of the decision;

(v) effects of decision on others. If the decision affects those with protected characteristics under the Equality Act 2010, due regard must be had to the decision-maker's public sector equality duty; and

(vi) advice from officers.

(c) Examples of irrelevant considerations include:

(i) the need to get business finished quickly;

(ii) assumptions not based on evidence;

(iii) personal experience of a different situation; and

(iv) dislike for the person affected by the decision or what they represent.

3.10.7 Proper purpose

(a) A public body must act for a proper purpose. Those making public decisions must not have ulterior motives and must apply their minds when making decisions to the correct statutory objective (Padfield v Minister of Agriculture, Fisheries & Food [1968] AC 997).

(b) A public body must not act in bad faith, which is akin to dishonesty (Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223 (at 229)).

(c) An example of an improper motive is exercising local authority powers for the electoral advantage of a particular political party (Magill v Porter [2001] UKHL 67).

3.10.8 ECHR-compliant

(a) It is unlawful for any public body to act contrary to one of the rights contained in the European Convention on Human Rights (ECHR) that has been incorporated into domestic law by the HRA:

3.10.9 Proportionate

(a) Public decision-makers should act in a way that is proportionate. While the common law does not necessarily accept proportionality as a ground for judicial review, it is a principle embedded in both EU and ECHR law and touches on most of the decisions taken by public bodies:

(b) A decision that is proportionate, is also likely to be rational, evidence-based and reasonable. See R v Secretary of State for the Home Department, ex parte Brind [1991] 1 AC 696):

> *"reliance on proportionality is simply a way of approaching the Wednesbury formula: was the administrative act or decision so much out of proportion to the needs of the situation as to be "unreasonable" in the Wednesbury sense."* (Lord Lowry (at 766D-E).

3.10.10 Properly reasoned

(a) Procedural requirements may specify that a public body must give reasons for its decisions. It should do so in any event, not only because the common law may require it, but because a well-reasoned decision will fully inform those affected about the decision the body has taken. Reasoned decisions also enable those affected to consider whether to subject it to legal challenge, and on what grounds. Well-reasoned decisions help public bodies withstand legal challenge by explaining their thought processes.

(b) The process of setting out written reasons for a decision also improves the decision-making process by making the decision-maker focus on the logic lying behind its decision (R v Brent LBC, ex parte Baruwa (1996) 28 HLR 361).

3.11 **Practical requirements**

3.11.1 Reading all the papers

(a) Decision-makers are often busy people. The decision to hand may be only one of a handful of things that occupy their time on any given day. They may

also have been presented with a substantial bundle of papers to read that are relevant to the decision to be made.

(b) Decision-makers must read all the papers that have been provided and that are relevant to the decision they are about to make. Failure to do so, out of laziness, insufficient time or a belief that they are irrelevant, would be a breach of their duty. It could also likely lead to a decision that is unlawful as it fails to take account of relevant considerations.

3.11.2 Taking legal advice where necessary

(a) Some procedural rules expressly require a decision-maker to be accompanied by a legal adviser. For example, the disciplinary committees of the regulators of the professions (doctors, teachers, social workers and so on) are often required by the rules governing their procedures, to have in attendance a legal adviser or assessor to provide independent legal advice to the committee.

(b) Other decision-makers are not required to have legal advice available to them. However, any decision-maker who is in any doubt about their remit should take independent legal advice. This may need to be disclosed to those affected by the decision in question.

(c) Some decision-makers find it helpful for the person giving them independent legal advice to put their reasoning in writing. This has many advantages; but the legal adviser should faithfully reproduce the decision-makers' reasoning and refer to information they considered relevant, rather than interposing his own thoughts or view.

3.11.3 Minutes

(a) Some decision-makers' procedural rules require minutes to be taken. Others prohibit this, either expressly or as a matter of practice.The relevant procedure should be followed, provided that an adequate record is kept of the decision reached and the reasons.

3.11.4 Transparency and FOIA

(a) Public bodies do not operate in a vacuum. Even though many may deliberate in private, their papers may subsequently be disclosed to the public, either in accordance with the relevant publication scheme under FOIA, or as a result of a specific request for information under section 1 of FOIA by a person affected by the decision.

(b) Decision-makers should remember that all the material they consider and any notes they make, as well as their ultimate decision, may be disclosable in this way.

4 Predetermination

4.1 The Localism Act 2011 received the Royal Assent on 15 November 2011. It includes several provisions which were described by the coalition government as being designed to give local authorities greater freedoms and flexibility. One declared intention was that the Localism Act 2011 would clarify the rules on predetermination. These have been developed by the courts to ensure that councillors participated in meetings with an open mind. But in practice the government considered they had been interpreted in a way which reduced the quality of local debate and stifled valid discussion.

4.2 Section 25 effectively codified the common law position. As the explanatory notes (issued by the Department for Communities and Local Government when LA 2011 had received Royal Assent on 15 November 2011) indicated (in paras 121–122):

'Section 25 clarifies how the common law concept of 'predetermination' applies to councillors in England and Wales. Predetermination occurs where someone has a closed mind, with the effect that they are unable to apply their judgment fully and properly to an issue requiring a decision. Decisions made by councillors later judged to have predetermined views have been quashed. The section makes it clear that if a councillor has given a view on an issue, this does not show that the councillor has a closed mind on that issue, so that if a councillor has campaigned on an issue or made public statements about their approach to an item of council business, he or she will be able to participate in discussion of that issue in the council and to vote on it if it arises in an item of council business requiring a decision.'

4.3 Section 25 came into force on 15 January 2012. It is set out in full in the appendix to this advice.

4.4 Section 25 applies if there is an issue about the validity of a decision, as a result of an "allegation of bias or predetermination, or otherwise" and "it is relevant to that issue whether the decision-maker (or any of the decision-makers) had, or appeared to have had, a closed mind (to any extent) when making the decision" (section 25(1)). Section 25(1) is drafted in such a way as to catch as many cases as possible in which an allegation of predetermination might be made which could affect the validity of a decision. It catches allegations of actual and apparent predetermination (however tenuous).

4.5 Section 25(2) provides that when making a decision, a decision-maker "is not to be taken to have had, or to have appeared to have had, a closed mind (to any extent) **<u>just because</u>** " he " has previously done anything that directly or indirectly indicated what view he took, or would, or might take, in relation to a matter", and that matter was relevant to the decision. So section 25(2) applies both when there might otherwise be a suggestion of actual, or perceived, predetermination.

4.6 The use of the words "just because" are significant. This means that there is a line which can still be crossed, with the result that some decisions will still be invalid by reason of predetermination, despite the enactment of section 25. But this phrase does not help to show where that line may be.

4.7 Section 25 applies to views not just about the subject matter of the decision in question, but to anything that a councillor has done which might show, directly, or indirectly, what view the councillor takes, or would take, or might take, about any matter which is relevant to the decision.

4.8 So if councillors are to vote on a planning application and the development in question would cause disturbance to rare bats, a member who is chair of the local bat preservation

society, and has spoken movingly on the plight of bats, would not be disqualified from voting on the application "just because" they were chair of the society, or had spoken up for bats.

4.9 But depending on all the other circumstances, he could be.

4.10 Although the common law has always regarded a closed mind as a bad thing, it has never required decision-makers to undertake their work with empty minds. This explains the provisions of section 25(2), which does no more than to underline specific matters that are not of themselves to be treated as deciding that there has been unlawful predetermination.

4.11 The approach that the courts have taken in relation to predetermination is not dissimilar to the approach that Parliament has taken in the drafting of section 25. The general trend of court decisions in this area has been to recognise the practical reality that local councillors are really politicians and that they are likely to have political opinions on matters of local controversy. The decisions show that the courts do understand the practical reality, and the rough and tumble, of local politics and have, where possible, distinguished these from genuine predetermination.

4.12 A realistic approach was taken in R (Lewis) v Redcar and Cleveland BC [2008] EWCA Civ 746; [2009] 1 WLR 83. In Lewis, a challenge to a grant of planning permission was dismissed. The decision-making process straddled an election. The Court of Appeal, allowing the developers' appeal, commented that members are elected to propose and to pursue policies, and were entitled to be predisposed to determine an application in accordance with their political views and policies, provided that it was clear they had not closed their minds (as evidenced by their conduct / behaviour or words), they listened to the arguments and had regard to material considerations. The test was whether the committee members had made their decision with closed minds or the circumstances gave rise to such a real risk of closed minds, such that the decision ought not, in the public interest, to be upheld. The court could infer a closed mind or the real risk that a mind was closed from the circumstances and the evidence. On the facts, neither the imminence of the local elections, nor the unanimity of the members of the majority group, nor any other evidence, showed that any of those who had voted in favour of the application had closed their minds to the planning merits of the proposal.

4.13 In IM Properties Development Ltd v Lichfield District Council [2014] EWHC 2440 (Admin), the High Court held that an e-mail from the chair of a local authority planning committee to members of the chair's political party (which told the recipients to vote in favour of a proposal to modify a local plan strategy, or abstain from the vote) fell within section 25(2) and did not amount to predetermination.

4.14 The email from the Chair was in the following terms:

'This is to remind group members who attended the last group meeting and inform those who did not, that the group decided in government parlance to have a three line whip in place at the council meeting on Tuesday. In plain terms group members either vote in favour of the report I will be giving regarding the local plan or abstain. Also if you are approached by anyone promoting alternative sites, please make no comment. If group members are reported making negative comments it would without any doubt derail our local plan. Sorry if you find this a little heavy handed but there is an awful lot at stake…'

4.15 However, Patterson J concluded that she did not:

'…find that the tenor of the email was so strident as to remove the discretion on the part of the recipient as to how he or she would vote. Neither the language used nor the absence of any sanction support that contention. The debate shows a far reaching discussion between members and displays no evidence of closed minds in relation to the decisions that had to be

taken. A fair minded and reasonable observer in possession of all of the facts would not be able to conclude on the basis of the evidence that there was any real possibility of predetermination as a result of the email from [the Chair].'

4.16 So, the correct approach is this.

4.17 If a fair minded and informed observer (a "notional observer") who is neither complacent nor unduly sensitive or suspicious, having considered the facts, would conclude that there was a real possibility of bias or predetermination, then apparent bias or predetermination is established.

4.18 In the context of decisions reached by a council committee, the notional observer is also a person cognisant of the practicalities of local government. He does not take it amiss that councillors have previously expressed views on matters which arise for decision. In the ordinary run of events, he trusts councillors, whatever their pre-existing views, to approach decision making with an open mind.

4.19 If, however, there are additional facts / circumstances which suggest that councillors may have closed their minds before embarking upon a decision, then he will conclude that there is a real significant possibility of predetermination.

4.20 It is important to note that the presumption set by Section 25 that there is no closed mind can be rebutted. This is where the words "just because" apply. Where a member said something like "over my dead body" in respect of voting a particular way on an issue, or does something allowed by section 25 but then goes further, the 2011 Act does not change the legal position that if the member could then taking account of all the evidence be shown to have approached a decision with a closed mind, that could affect the validity of the decision.

4.21 An example is R (ex parte the Partingdale Lane Residents Association) v London Borough of Barnet (2003). In line with a commitment he had made in his election manifesto, a new cabinet member instructed officers to prepare traffic orders to re-open Partingdale Lane to through traffic, and to carry out associated consultations. In speeches and emails, the councillor had stated that the lane 'will be re-opened'. The claimants argued that the consultation had been pre-determined. They won. This was a clear case of pre-determination, the decision maker through their words and actions had made it clear their mind was closed. The councillor involved had gone beyond a legitimate predisposition towards the reopening of the road in question, and had predetermined the issue before the consultation had ever taken place. He had stated in correspondence that the road would be reopened before the issue had gone for consultation. His position had been unequivocal. It shows how careful elected members must be, especially with manifesto commitments.

4.22 But:

4.22.1 while Members are required to have an open mind, they need not have an empty mind;

4.22.2 members are entitled to have and will probably have views on planning matters, and may have expressed those views in Committee or publicly;

4.22.3 members or parties are entitled to have adopted a stance on a particular development or type of development, as long as they keep (and are seen to keep) an open mind on individual applications for that development;

4.22.4 predisposition - even strong predisposition - towards a particular outcome is not the same thing as pre-determining; and

4.22.5 "clear pointers are required if the state of mind is to be held to have become closed, or apparently closed" – Pill LJ, R (on the application of Lewis) v Redcar and Cleveland Borough Council [2009]

4.23 In Legard v Royal Borough of Kensington and Chelsea [2018] EWHC 32, the court summarised the legal position on predetermination as follows:

'The starting point must be a careful examination of all the facts before the court, and not simply those which would have been known to the claimant or a hypothetical onlooker. The test to be applied is whether a fair-minded and informed observer, having considered those facts, would conclude that there was a real possibility of bias on behalf of the decision-maker. The fair-minded observer should be neither unduly suspicious nor complacent. The fair-minded observer would need to be satisfied that the complaints made could be objectively justified as giving rise to a real possibility of bias. In addition, the fair-minded observer will take account of the overall context of the evidence in reaching a conclusion on the available facts. Part of that context will include, in relation to cases involving local government, that members of local authority are democratically accountable and will have political allegiances and policy positions. Thus, it has to be acknowledged that councillors may have a predisposition in relation to a particular decision, but that will not amount to predetermination provided they approach the decision with a mind which is willing to grasp all of the merits to be considered, and which is not closed to making a decision amounting to a departure from their predisposition"

4.24 In R (on the application of Island Farm Development Ltd) v Bridgend County Borough Council [2006] EWHC 2189 (Admin), [2007] LGR 60 by Collins J who said that:

"The reality is that Councillors must be trusted to abide by the rules which the law lays down, namely that, whatever their views, they must approach their decision-making with an open mind in the sense that they must have regard to all material considerations and be prepared to change their views if persuaded that they should.'"

4.25 Section 25 is intended to send out a general message to members and officers. That message may lack clarity at its margins, but its general tenor is plain. Members can feel more comfortable about voting when they have aired their views on that, or an associated, local issue, and when they take part in local life and politics in a way which has a bearing on a council decision. Officers can feel somewhat less nervous when giving advice about the sensible limits of those activities. But section 25 also illustrates the difficulty of drafting legislation which gives a clear answer to every question.

4.26 However, it is doubtful whether, in practice, section 25 adds anything to the existing common law. The courts have repeatedly held that the public expression of a preference by an elected member does not constitute predetermination. The words "just because" in section 25 leave scope for a court to find that there was predetermination where a local authority decision maker has expressed a view on a matter and other factors are present to demonstrate a closed mind.

4.27 Predetermination is therefore the surrender by the decision-maker of his/her judgement by having an evidentially closed-mind such that they are unable to apply their judgement fully and properly to an issue requiring decision.

4.28 It is essential that Councillors do not appear to have already made up their minds in advance of the meeting itself. Such impressions can be created in a number of different ways such as quotes given in the Press or what is said at the meeting itself or at other meetings and in correspondence (particularly, nowadays, in e mails)

4.29 Where a Councillor has a closed mind, this potentially has a direct impact on the validity of the decision and might make the decision challengeable either by way of Judicial Review or some other legal appeal process. If proven it would amount to a procedural irregularity and might mean that the decision taken by the Committee is then regarded as unlawful and void.

4.30 It must be heavily stressed that in rare and the most serious cases, there are situations in which a council member incurs personal and even criminal liability at law. This includes Code of Conduct findings. There are specific local government provisions, e.g. for failure to register a disclosable pecuniary interest or for not acting as required in respect of declaring council tax arrears at the budget meeting. There are also applications of more generic law, including:

4.30.1 offences under the Bribery Act 2010;

4.30.2 misconduct in public office, a common law criminal offence (and, on the face of it, the most common criminal conviction for offending members);

4.30.3 misfeasance in public, the civil common law equivalent;

4.30.4 particular personalised orders, such as those made in employment tribunals; and

4.30.5 breach of trust, most controversially, an outcome of Westminster City Council v Porter (2003).

4.31 It has always been the function of an authority's advisers to alert members to any possible illegality of a course that the council or committee wishes to pursue. Where an authority persists in pursuing what the officers believe may be an unlawful course of action, the officers should do what they properly can to protect the interests of the authority and its individual members

4.32 The issue is therefore an entirely legitimate matter for the Monitoring Officer and his/her staff to advise on. It is appropriate if not necessary for members to be given advice as to their position and the consequences of their proposed actions.

4.33 Ultimately it is for individual councillors to make their own decisions about what they do – in full knowledge of the risks that they bring to the council and/or themselves, having had the benefit of advice from council officers, most particularly the Monitoring Officer.

4.34 Planning Codes in many Councils cover this and says something akin to:

If a Committee Member has become involved in organising support for or opposition to a planning application, or has expressed support or opposition either publicly or to the applicant or objectors on a planning application and that application is to be considered at a meeting when he is sitting on the Committee, then that Committee Member should declare this at the beginning of the Committee meeting. They should leave the table (but not necessarily the room) when the application is being considered unless having taken account of the constitution and advice from the Monitoring Officer they are satisfied that they can consider or be seen to consider the application with an open mind.

4.35 If such a Member wishes to make representations on behalf of one of the parties, they may address the Committee at the discretion of the Chair provided doing so is in accordance with the Council's Constitution / procedures and is otherwise lawful / appropriate. This qualification is important because even then there is an issue for the member concerned to consider about the appropriateness of moving from the position of decision maker, perhaps a senior position in the Committee / Council and to representation mode, and whether that is appropriate in all the circumstances.

4.36 The courts have said on this point:

"Although the presence of a councillor with a prejudicial interest may give rise to lesser public concern when he is a non-member of the relevant committee than when he is a member of the committee, a non-member is still able to exert influence by reason of his position as a councillor, and the risk that public confidence in the decision-making will be impaired is a real one." (Richardson v North Yorkshire 2003)

4.37 The Local Government Association (LGA) produce guidance - " Probity in planning: Advice for councillors and officers making planning decisions". The latest version is dated December 2019. The guidance is well respected, followed by many and forms the basis for many Council's guidance for members and officers on planning.

4.38 On this issue the LGA's Guidance states:

If a councillor has predetermined their position, they should withdraw from being a member of the decision-making body for that matter. This would apply to any member of the planning committee who wanted to speak for or against a proposal, as a campaigner (for example on a proposal within their ward). If the Council rules allow substitutes to the meeting, this could be an appropriate option.(page 8)

4.39 We discuss this issue further and in more detail in section 6 in so far as it applies to the specific issue involving the Chair.

4.40 It should also be noted that the then Minister, Brandon Lewis MP wrote to all Councils in 2013 on this issue as follows:

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

4.41 This letter reflects the advice on the legal position set out above.

4.42 Finally, we also noted that the LGA have produced guidance on predetermination as part of their guidance alongside the new model members Code of Conduct the LGA have produced (though predetermination is not in fact an issue covered under the Code). We took account of the guidance in our considerations which can be found here.

https://www.local.gov.uk/publications/guidance-local-government-association-model-councillor-code-conduct#bias-and-predetermination

5 The Council's Constitution

5.1 Every local authority is required to prepare and keep up-to-date a constitution containing:

(a) its standing orders;

(b) its code of conduct;

(c) any information directed by the Secretary of State;

(d) any other information considered appropriate by the local authority; and

(e) in the case of a local authority operating the committee system the constitution must also contain a statement as to whether it has an overview and scrutiny committee (OSC). (Section 9P, LGA 2000.)

5.2 In 2000, the Secretary of State for the Environment, Transport and the Regions issued the Local Government Act 2000 (Constitutions) (England) Direction 2000 (the Direction). The Direction included that the constitution of a local authority in England must include '...a description of the rules and procedures for the management of its financial, contractual and legal affairs including:

5.2.1 procedures for auditing of the local authority;

5.2.2 the local authority's financial rules or regulations or such equivalent provisions as the local authority may have in place whether specified in the authority's standing orders or otherwise;

5.2.3 rules, regulations and procedures in respect of contracts and procurement including authentication of documents whether specified in the authority's standing orders or otherwise; and

5.2.4 rules and procedures in respect of legal proceedings brought by and against the local authority...'

5.3 A local authority's constitution must be made available:

(a) at its principal office to members of the public to inspect; and

(b) on request for a "reasonable fee" determined by the local authority. (Section 9P(3), (4), LGA 2000.)

5.4 Constitutions embody and lay out the considerable legal requirements reviewed in Section 4 of this report. There is therefore a significant overlap between the law and constitutions, but where the law permits they can also enable local governance arrangements to be given effect to.

5.5 There are a number of key aspects of the Council's constitution relating to planning that are worthy of note.

5.5.1 Code of Practice for Members and Officers Dealing with Planning Matters

(a) The Code of Practice can be found here:

https://iow.moderngov.co.uk/documents/s3841/PART%205%20-%20Code%20of%20Practice%20for%20Members%20and%20Officers%20Dealing%20with%20Planning%20Matters.pdf

(b) The status of this is set out as follows:

"This code sets out guidance for all elected councillors in various roles, including as local councillor and as a member of the Planning Committee"

(c) During this matter, the Council sought advice from Bevan Brittan, a firm of solicitors on an issue regarding site visits and they advised that:

"The Code is stated at its outset to contain "guidance for all elected councillors in various roles, including as a local councillor and as a member of the Planning Committee." We refer to this excerpt to make it clear that the Code is intended to constitute guidance, meaning that it sets out the ordinary principles that will apply to decision making in the context of planning. As with any guidance, departures can be made from it where to do so is properly considered to be appropriate in the circumstances, based on the particular facts, and where that guidance has been properly taken into account in that context with reasons for departure from it given.

The Code does contain statements at various points that Members must attend at official site visits. As stated above, this would be the standard position, however there may be instances where, upon proper considered advice from professional officers, attendance is not required based on the facts of the matter, and a departure from the guidance is justified."

(d) We have reviewed this advice and consider that it is correct and further that this sets out the correct approach to be taken to such Guidance within the Council's Constitution. In that case, the law and indeed the purpose of the Guidance will be crucial in determining the correct advice to be given.

(e) The Code provides Guidance and as such cannot cover all eventualities or circumstances.

5.5.2 Protocol for Planning Committee Site Inspections

(a) The Protocol can be found here:

https://iow.moderngov.co.uk/documents/s3842/PART%205%20-%20Protocol%20for%20Planning%20Committee%20Site%20Insspections.pdf

(b) It establishes procedures for the organisation of Planning Committee site inspections

(c) During this matter, the Council sought advice from Bevan Brittan, a firm of solicitors on an issue regarding this and they advised that:

In summary, our view is that there is no power to stop a Member from taking part in the Planning Committee on the basis of having not attended at a site visit. It is a matter for the Member to determine with the benefit of professional advice on the same.

Although the Council's Code on Planning does state that Members must attend, this is guidance and there can be departures from that guidance where this is appropriate and for good reasons.

(d) We have reviewed this advice and consider that it is correct.

6 Issue 1: The Chair of the Planning Committee

6.1 We were instructed as follows:

6.1.1 The Current Chair of the Planning Committee, Cllr Lilley (The Chair) in his capacity as a ward member campaigned against this application prior to the local election at the Council in May 2021 when he was in the opposition

6.1.2 After the elections in May 2021 he was appointed chair of the planning committee as part of the administration

6.1.3 In emails supplied to us we have seen that he agreed that he would not attend or chair the meeting that considered this application and a substitute attended. He also agreed that he was predetermined in his view and had campaigned actively against the developed before and after the elections in May

6.1.4 However he felt he still had the ability to speak as the ward member

6.1.5 Subsequently he was advised by the Monitoring Officer not to attend the meeting and speak because of his bias on the decision (relying on the Richardson V North Yorkshire caselaw). This advice was confirmed by Bevan Brittan in independent additional advice

6.1.6 Unfortunately it was suggested he could make his case by video link, but on review this proposal was withdrawn.

6.1.7 He did not attend the meeting but his written representations were read out.

6.2 We have had reference to emails from the Chair in which he states that he accepts he had predetermined. He also made it clear that as a result, he would not sit on nor would he Chair the meeting in question.

6.3 We have also made reference to his website and had regard to the objections he had lodged with the Council's planning dept to the application in question. His campaigning / manifesto commitments taken in isolation may well not have amounted to predetermination, taking account of Section 25, but when taken alongside the objections to the application in question lodged by him, these would in our view amount to additional factors of significant weight and the kind of clear pointers that the courts have said must exist before predetermination arises.

6.4 We therefore agree with him that he had predetermined the matter. His position on the application was unequivocal.

6.5 We of course acknowledge that while Members are required to have an open mind, they need not have an empty mind, that they are entitled to have and will probably have views on planning matters, and may have expressed those views in Committee or publicly, that in election campaigns they (or their party) are entitled to have adopted a stance on a particular development or type of development.

6.6 But they must nevertheless keep an open mind on individual applications for that development. Predisposition - even strong predisposition - towards a particular outcome is not the same thing as pre-determination.

6.7 As the courts have said, “clear pointers are required if the state of mind is to be held to have become closed, or apparently closed”.

6.8 As we set out in para 6.3, the Chair's position was unequivocal. We believe this went beyond the predisposition position and by some way. He had in our view predetermined and was quite correct in his own analysis of the situation.

6.9 Our advice had we been advising him at the time would have been unequivocal too. The Chair had predetermined and we would have advised that he should withdraw and take no role in the decision making.

6.10 Where a Councillor has a closed mind, this potentially has a direct impact on the validity of the decision and might make the decision challengeable either by way of Judicial Review or some other legal appeal process. If proven it would amount to a procedural irregularity and might mean that the decision taken by the Committee is then regarded as unlawful and void.

6.11 The issue therefore is one of legitimate concern for the Monitoring Officer / Council. As such, it is appropriate if not necessary for members to be given advice as to their position and the consequences of their proposed actions.

6.12 Ultimately it is for individual councillors to make their own decisions about what they do – in full knowledge of the risks that they bring to the council, having had the benefit of advice from council officers, most particularly the Monitoring Officer.

6.13 As to the issue whether having withdrawn as Chair / a member of the decision making body, whether he could then address the Committee, we would have advised also that he should not.

6.14 We note that Bevan Brittan, a firm of Solicitors, provided advice to the Council on this and we agree with their advice. They said:

The default position is that where a member has a DPI or a close personal interest in a matter being decided at a meeting, then they must not take part in the vote or debate, and are to withdraw from the meeting room. The case of Richardson v North Yorkshire County Council [2003] All ER (D) 372 (Dec) is authority for the point that a member cannot attend at a meeting in a personal capacity where they have an interest. That case was however based on the statutory Code of Conduct in place at the time. A later iteration of the statutory Code did permit members to attend at and speak to items of business in which they had an interest, as long as members of the public were also able to do so, however they were required to leave the room as soon as they had spoken.

So in summary the default position is that if the Code does not permit a member to attend and make a representation in common with members of the public, then they are not able to do so.

The Council's current Code of Conduct, which is of course not a statutorily prescribed code but a local one as is required under the Localism Act 2011, does not state that Members are able to attend and make representations in common with the public where they have an interest.

That said, the Code of Practice for Members and Officers dealing with planning matters… states the following:

> *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, the member must not take part in the consideration of the item, and they must leave the room. However, members with such an interest may have the same participation rights as a member of*

the public if a dispensation has been granted by the Monitoring Officer, 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 followed the process for registering to speak as a member of the public is required to do.

(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, however, in addition to having obtained a dispensation, have followed the process for registering to speak as a member of the public is required to do.

On the basis of the above, then the Councillor could attend as a member of the public and make representations where they have obtained a dispensation to do so, and where they have registered to speak as a member of the public. The difficulty here is that the Councillor is proposing to speak as a ward councillor, which does not arguably fall within a description of "speaking as a member of the public". In any case, notwithstanding what the Code may say or whether a dispensation has been granted, the underlying law of common law bias and predetermination will still apply.

On the point of a substitute attending in the Councillor's place, page 149 of the constitution (page 191 of the pdf) states the following:

> *Written notice of substitute members must be given to the Members Support Manager before the meeting begins and will be announced at the beginning of the meeting. Once the meeting has been informed of the appointment of a substitute, the original member may not resume membership of the committee until after the conclusion of the meeting.*

On that basis if the Councillor did attend the meeting after the substitution had been announced at the beginning of the meeting, then once the meeting has been informed in that respect the original member would not be able to resume membership during the meeting.

6.15 There is however a further issue which is the point that the Councillor in question is the Chair of the Planning Committee.

6.16 On this Bevan Brittan said:

Paragraph 5(1) of Schedule 12 of the Local Government Act 1972 states "at a meeting of a principal council the chairman, if present, shall preside." In the case of Re Wolverhampton Borough Council's Aldermanic Election (1961) the mayor (being the chair of the meeting) was a candidate for election to a post of alderman. The mayor vacated his chair just before the council proceeded to the election of alderman, but he delivered a voting paper and remained in the Council chamber. In the judgment Glyn-Jones J said:

> *"In my opinion it was Parliament's intention that at a meeting of the council the mayor's place, and his only place, should be in the chair. Seated in the mayoral chair he can exercise all his one and indivisible functions…When he is not in the mayoral chair…then, since his functions are one and indivisible, he has lost his right to exercise any of them so far as taking part in the meeting is concerned."*

Therefore if present at a meeting, the chair must preside, and if for any reason they vacate the chair, they must leave the meeting so as not to contravene the specific statutory direction that they must preside if present.

There is however an argument that if attending in a personal capacity, the Chair would not be acting as a member. It is not clear how this would be determined by a court if challenged. That said, if the Cllr was seeking to make representations as ward councillor, then they would be acting in their capacity as a member, and the rule would bite. Even if they were making personal representations, it could be argued that the case of Richardson (as set out in the previous email) applies in the circumstances.

6.17 We agree with the advice that Bevan Brittan provided with the caveats as to Richardson. It is important to note that this case applied to an interest rather than predetermination and that the law on interests and its impact has changed, though this is not relevant to the issues arising here.

6.18 However, there remains an issue for such a member who is a member of the planning committee who has predetermined as is not taking part in the decision making to consider about the appropriateness of moving from the position of decision maker, perhaps a senior position in the Committee / Council and to representation mode, and whether that is appropriate in all the circumstances.

6.19 The Local Government Association (LGA) produce guidance - " Probity in planning: Advice for councillors and officers making planning decisions". The latest version is dated December 2019. The guidance is well respected, followed by many and forms the basis for many Council's guidance for members and officers on planning.

6.20 On this issue the LGA's Guidance states:

If a councillor has predetermined their position, they should withdraw from being a member of the decision-making body for that matter. This would apply to any member of the planning committee who wanted to speak for or against a proposal, as a campaigner (for example on a proposal within their ward). If the Council rules allow substitutes to the meeting, this could be an appropriate option.(page 8)

6.21 Further, members of the Council are required to follow the Council's Code of Conduct which states:

> *You should behave in a manner that is consistent with the "Nolan Principles – the seven principles of public life", which apply to anyone who is elected or appointed to public office:*
>
> *SELFLESSNESS - Holders of public office should act solely in terms of the public interest.*
>
> *INTEGRITY - 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.*
>
> *OBJECTIVITY - Holders of public office must act and take decisions impartially, fairly and on merit, using the best evidence and without discrimination or bias.*
>
> *ACCOUNTABILITY - Holders of public office are accountable to the public for their decisions and actions and must submit themselves to the scrutiny necessary to ensure this.*

OPENNESS - Holders of public office should act and take decisions in an open and transparent manner. Information should not be withheld from the public unless there are clear and lawful reasons for so doing.

HONESTY - Holders of public office should be truthful. They must declare any private interests relating to their public duties and take steps to resolve any conflicts arising in a way that protects the public interest.

LEADERSHIP - Holders of public office should exhibit these principles in their own behaviour. They should actively promote and robustly support the principles and be willing to challenge poor behaviour wherever it occur

6.22 We would have advised the Chair that given his senior and leadership position, and his (in our view and his) predetermination, he should not be present at all at that item in the meeting. His involvement having so clearly stated his position, then quite rightly having stood aside as Chair and a member of the Planning Committee yet turning up to make representations to the same members he normally presided over as Chair and in the future would preside over would , in our view, not have sat easily with the underlying principle we cite in para 4.36 from Richardson which we still feel carries weight and the Nolan principles.

6.23 Finally, this accords with the LGA's Guidance which we are aware is followed by many other Councils.

6.24 Members who also are members of the planning committee but who do not a position of responsibility on the committee e.g. Chair would need to consider similar matters, but their role / influence on the Committee might be different so the outcome could well also be different.

6.25 We should add that in respect of a ward member who is not a member of the planning committee, they would need to reflect upon similar issues, including but not limited to their the effect of them upon the committee by attending to make representations and their personal position under the Code of Conduct with particular reference to the Nolan principles, but it would be less likely (in general terms) that this would prevent a ward member from making representations whether they had a strong view for or against an application. They would not be a decision maker so predetermination alone would not be an issue.

7 Issue 2: Site Visits

7.1 We were instructed that:

7.1.1 One Councillor (Cllr Price) attended for part of the site visit

7.1.2 He was advised by the Vice-Chair that as a result, he should not take part in the debate or vote on the application

7.1.3 The Code of Practice for Members and Officers Dealing with Planning Matters in the Council's Constitution says that, "members of the Planning Committee must attend official site visits in order to participate in the debate and vote".

7.1.4 Subsequently the Council's Monitoring Officer gave advice on another application that legally the Council does not need to require attendance at site visits depending upon the facts / circumstances.

7.1.5 This councillor is now saying had he known this he would have been able to participate and would have voted against the development. However in the view of officers it is unlikely when challenged that he could demonstrate that he had full knowledge of the site, so it was right he did not take part and vote.

7.1.6 He sought no advice from the Monitoring Officer on the basis of what is in the constitution

7.2 The Council sought advice from Bevan Brittan who said:

The first point that must be made is that there is no power to stop a Member from taking part in a meeting or consideration of an item of business. It is a matter for the Member themselves, upon having received appropriate professional advice, as to whether they should or should not be participating in a meeting. Of course where that Member has a disclosable pecuniary interest (DPI), taking part could result in a criminal offence being committed by them. In addition, taking part where there is a DPI can increase risk of successful challenge to a decision, as can a member taking part who has an 'other interest', or is predetermined. Taking part in these circumstances, and against proper advice, could also be considered to be a breach of the Code of Conduct, and the Council's Planning Code.

With reference to decisions taken by the Planning Committee, it is of course ordinarily preferable that all Members of the Committee who are to take a decision on a particular item attend at a site visit relating to that item if such a visit is arranged, however non-attendance at such a site visit does not of itself automatically mean that the Member should not be taking part. The key question is whether the Member has all appropriate information before them in order to make a decision on the item at the Committee meeting. This very much depends on the particular facts.

We note that the Council has in place a Planning Code which can be accessed at the following address:

https://iow.moderngov.co.uk/documents/s3841/PART%205%20-%20Code%20of%20Practice%20for%20Members%20and%20Officers%20Dealing%20with%20Planning%20Matters.pdf

The Code is stated at its outset to contain "guidance for all elected councillors in various roles, including as a local councillor and as a member of the Planning Committee." We refer to this excerpt to make it clear that the Code is intended to constitute guidance, meaning that it sets out the ordinary principles that will apply to decision making in the context of

planning. As with any guidance, departures can be made from it where to do so is properly considered to be appropriate in the circumstances, based on the particular facts, and where that guidance has been properly taken into account in that context with reasons for departure from it given.

The Code does contain statements at various points that Members must attend at official site visits. As stated above, this would be the standard position, however there may be instances where, upon proper considered advice from professional officers, attendance is not required based on the facts of the matter, and a departure from the guidance is justified.

We understand that Officers of the Council are of the professional opinion that attendance at the site visit is not likely to have a substantive impact upon the Councillor being able to exercise their discretion properly, and that they have sufficient relevant information and information to make a decision on the variation. Those Officers further state that any material considerations arising from the visit will in any case be presented to the meeting. Further, the Councillor attended the previous visit, and is in fact being taken on a one to one visit today.

In any case, as stated above, whether to participate is a matter for the Councillor to determine having received appropriate advice. That advice is that on the basis of the exceptional circumstances and facts the Councillor is able to attend and participate, and is in a position to have had access to and awareness of all appropriate and relevant information.

There is of course always a risk of challenge to any decision made by the Planning Committee (or indeed any committee of the Council), and a departure from standard procedure could increase that risk. Nonetheless, that is not to say that a departure would always result in successful challenge – much depends on the facts of the matter, and in this instance on the basis of the information we have been provided by the Council, we would suggest that the risk of a successful challenge would be low on the basis of the facts, and that the Member does already have knowledge and awareness of all relevant information to make that decision.

7.3 We agree with that advice.

7.4 We note that it was and remains the view of officers that it is unlikely when challenged that the Cllr could demonstrate that he had full knowledge of the site, so it was right he did not take part and vote.

7.5 On that basis the advice he should have received was that he should not have taken part.

7.6 Where a Councillor makes a planning decision without such full knowledge of the site not having attended / not having attended in full a site visit, this potentially could make the decision challengeable either by way of Judicial Review or some other legal appeal process. If proven it would amount to a procedural irregularity and might mean that the decision taken by the Committee is then regarded as unlawful and void.

7.7 The issue therefore is one of legitimate concern for the Monitoring Officer / Council. As such, it is appropriate if not necessary for members to be given advice as to their position and the consequences of their proposed actions.

7.8 Ultimately it is for individual councillors to make their own decisions about what they do – in full knowledge of the risks that they bring to the council, having had the benefit of advice from council officers, most particularly the Monitoring Officer.

7.9 It should be noted that the Council's Code of Practice for Members and Officers Dealing with Planning Matters states:

The need for site inspections (which, if required, will take place prior to the committee meeting) will be determined by the Strategic Manager for Planning and Infrastructure Delivery or authorised officers in consultation with the committee chairman. In deciding whether it is appropriate to hold a site inspection, consideration will be given to any state of national emergency (e.g. Covid-19) as to whether the council may have to suspend this provision. Members of Planning Committee must attend official site visits in order to participate in the debate and vote.

7.10 This is guidance, but we agree that if sufficient knowledge of the particular site has already been acquired, the need for a particular attendance at a site inspection would not arise, though might still be desirable.

7.11 The wording however (especially the use of the word "must") understandably leads to a view that this is mandatory.

7.12 That is not the case, and when viewed in the around and alongside the law, the position is clear.

7.13 For that reason we consider that it would be wise to revisit and clarify what the status of the Code is. If it is to remain as guidance, the use of the word "must" is in our incompatible with its status.

7.14 We also note that Code also says:

"The decision as to whether a member can continue to participate in development management decision-making is one primarily for individual members, having received advice from the Monitoring Officer".

8 Issue 3: Advice to 2 Members re possible predetermination

8.1 We were instructed as follows:

8.1.1 The Deputy Monitoring Officer contacted two councillors, Cllrs Adams and Jarman, who were also members of the Planning Committee advising that in his view, they might have predetermined views on the issue so should could consider whether or not they participated in / attended the meeting

8.1.2 One agreed and did not. The one who did not attended the meeting and participated.

8.1.3 The one who stayed away has now indicated that he might have attended the meeting in the light of all that has passed and been said on the issue.

8.2 Whether or not the two Cllrs had predetermined the matter was properly a matter for advice from the Deputy Monitoring Officer.

8.3 Of course members will discuss issues with other members in group settings, and ultimately it is the individual members' decision whether or not they should participate albeit that officer's may advise strongly on this issue as there may be significant consequences for the Council (and the individual members) if successful court action follows.

8.4 But the authoritative advice comes from the Monitoring Officer.

8.5 That was what happened.

8.6 Ultimately it is for individual councillors to make their own decisions about what they do – in full knowledge of the risks that they bring to the council, having had the benefit of advice from council officers, most particularly the Monitoring Officer.

8.7 The fact that the two members took differing decisions after having been given that advice is neither wrong nor unusual. Nor is it a basis for challenging or re running the committee.

9 Other Matters

9.1 At the heart of this matter is what we sometimes describe as the norms of decision- making, in this case in relation to planning and LPA functions.

9.2 The Council needs to arrive at a way of working in terms of its governance around planning that not only has the rules, checks and balances to prevent a re-occurrence of what occurred in relation to this matter, but more fundamentally addresses the trust & confidence issues, particularly addressing the underlying behaviours and culture.

9.3 This requires leadership. This must come from the managerial leadership and the political leadership, but the managerial leadership must take the initiative. New councillors are very unlikely to have served elsewhere and may therefore adopt and follow the IOW "way" or perceived way of doing things.

9.4 The managerial leadership must show the way and shine a light on where change is needed. The political leadership must accept the existence of the issue, be prepared to change and work jointly with senior officers on delivery of that.

9.5 Lead members must also have a way of working that supports collective working with all members. This is about member buy in and visibility.

9.6 Members generally must respect officers' professional advice and officers' roles. It is their duty to give it, and statutory officers more so.

9.7 Effective Communications is crucial, whether between officers, between members or between officers and members. That includes the ability to challenge advice or proposed decisions. The relationship – and trust – must be developed to enable such conversations to take place without fear, and without a subsequent inappropriate response or action.

9.8 Of particular importance is the relationship between the chief executive and leadership. Particular attention as to how best to establish and maintain effective communication is of vital importance to both roles (officers and members) but also consequentially, the performance and delivery of both groups and hence (and critically) the strength of the Council's performance for its citizens.

9.9 Max Caller, the author of the best value report for Northamptonshire CC said

> *In Local Government there is no substitute for doing boring really well. Only when you have a solid foundation can you innovate.*

9.10 In Northamptonshire a large part of the "*boring*" was sound governance and decision-making with an effective member / officer culture and approach.

9.11 IOW has clearly had governance issues around its planning decision making. As a result there now needs to be a focus on the "boring".

9.12 A starting point might be revisiting the understanding of the roles of officers and members (both on planning committee but also within the council generally) and how officers and members work jointly on delivery of the LPA's functions.

9.13 There are also constitutional documents that require review / revisiting to ensure the "line in the sand" set by them is correct, clear and understood (commonly) by all. These include:

9.13.1 the Code of Practice for Members and Officers dealing with planning matters

9.14 There may be others that officers / members regard as relevant also.

9.15 It is within these relationships and documents that we consider the cause of these events lie.

9.16 Developing that mutual understanding and respect will take time but will serve to reset the foundations of the Council's governance around the delivery of the LPA function. So it is here that we recommend the Council should start.

9.17 Defining the roles and being clear that the parties will respect the roles will start to develop a relationship that is based on the sound foundations of the norms of good governance.

9.18 We strongly believe this will require external facilitation and support.

9.19 The approach to the Constitution and the way in which issues such as this are interpreted would be worthy of inclusion with this further facilitated work.

9.20 The Council has by law to have a Constitution and its contents are specified by law (see section 3.6 of this advice). The Courts have held that failure to follow one's own procedures, for example the Constitution, can justify intervention (see section 3.10.2 of this advice). Therefore the constitution must be followed.

9.21 Where there are areas of doubt as to the interpretation or application of the Constitution, the first place to refer to is the law. The Constitution must follow the law. Where there is conflict or confusion, the law is the starting point.

9.22 As Council's are creatures of statute, the primary and secondary legislation (statutes and regulations) set out their powers and acting outside them is ultra vires (see section 3.10) of this advice.

9.23 Case law will also be relevant in determining such issues and may well need to be referred to.

9.24 Obviously when such issues arise, a key follow up task is to review / revise that aspect of the Constitution.

9.25 Confidence and trust in the aspects covered by this Advice set out in the Constitution has been eroded so a facilitated review of the key aspects would be advisable.

9.26 We would also want to add that there needs to be a systemic approach to member and officer training and development around governance and associated issues. New members, or members taking on new roles need good support and mentoring.

9.27 We are aware that the Council in 2021 provided a general induction session to all members, followed by more specific training for those members of the Planning Committee.

9.28 Given the issues that have arisen here, the relevant parts of the Constitution relating to predetermination and site visits (once revisited) should perhaps feature strongly going forward in such training as well as "catch up" training once any review / changes have been made to the current arrangements.

10 Concluding Comments

10.1 We were asked to conclude by considering whether the decision made by the Committee was "safe"?

10.2 Based on the information we have we believe on balance it is. The issues do not, as we have set out in this advice, raise significant legal issues given how they were dealt with. Allowing the involvement of those who had predetermined could well have raised such an issue.

10.3 This is advice on balance as this has been a desktop review and also we have only looked at those issues we were instructed to consider.

10.4 We are aware that there is a view that this matter should be re-determined.

10.5 It is an option for public bodies facing a challenge based on a procedural point related to their decision making to re-make the decision under attack. Given that if such a challenge is successful, the court may well order the remaking of the decision anyway but “properly” (i.e. the re-taking of the decision by a person or body with proper authority), this can avoid the legal challenge.

10.6 However, the position of the applicant and the risks of re-making the decision are factors.

10.7 If that is something that the Council wish to pursue we would strongly advise that the Council seeks Counsel's advice.

10.8 The risks of challenge by remaking it exist and they need to be drawn out. Members if they are considering such an option must be advised of those.

10.9 There are other matters as well, but such a potential decision should be approached by the members with a clear understanding of all the issues / risks.

Appendix: Section 25 Localism Act 2011

Chapter 6
Predetermination

25 Prior indications of view of a matter not to amount to predetermination etc

(1) Subsection (2) applies if—

(a) as a result of an allegation of bias or predetermination, or otherwise, there is an issue about the validity of a decision of a relevant authority, and

(b) it is relevant to that issue whether the decision-maker, or any of the decision-makers, had or appeared to have had a closed mind (to any extent) when making the decision.

(2) A decision-maker is not to be taken to have had, or to have appeared to have had, a closed mind when making the 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.

(3) Subsection (2) applies in relation to a decision-maker only if that decision-maker—

(a) is a member (whether elected or not) of the relevant authority, or

(b) is a co-opted member of that authority.

(4) In this section—

"co-opted member", in relation to a relevant authority, means a person who is not a member of the authority but who—

(a) is a member of any committee or sub-committee of the authority, or

(b) is a member of, and represents the authority on, any joint committee or joint sub-committee of the authority,

and who is entitled to vote on any question which falls to be decided at any meeting of the committee or sub-committee;

"decision", in relation to a relevant authority, means a decision made in discharging functions of the authority, functions of the authority's executive, functions of a committee of the authority or functions of an officer of the authority (including decisions made in the discharge of any of those functions otherwise than by the person to whom the function was originally given);

"elected mayor" has the meaning given by section 9H or 39 of the Local Government Act 2000;

"member"—

(a) in relation to the Greater London Authority, means the Mayor of London or a London Assembly member, and

(b) in relation to a county council, district council, county borough council or London borough council, includes an elected mayor of the council;

"relevant authority" means—

(a) a county council,

(b) a district council,

(c) a county borough council,

(d) a London borough council,

(e) the Common Council of the City of London,

(f) the Greater London Authority,

(g) a National Park authority,

(h) the Broads Authority,

(i) the Council of the Isles of Scilly,

(j) a parish council, or

(k) a community council.

(5) This section applies only to decisions made after this section comes into force, but the reference in subsection (2)(a) to anything previously done includes things done before this section comes into force.