

Predetermination Changes Under the Localism Act

New rules on bias and predetermination which have now been introduced by the Localism Act.

Section 25 of the Act is as follows:

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.

Predetermination occurs where a Councillor has prematurely e.g. before the committee meeting, expressed how he or she will decide a matter. Bias is where because of things a Member may have done or said they can be said to have an interest or apparent interest in the matter to an extent where that Member should not be hearing it or making decisions about it.

The Localism Act has sought to put into legislation the common law position. This position is taken from cases such as *National Assembly for Wales v Condon & Anor [2006] EWCA Civ 1573 (27 November 2006)* where a member said before a meeting that that he was '*going to go with the Inspector's Report*'. This was found to be a predisposition and not a predetermination. Under the Act predisposition by Members is legitimate as what they had said previously simply indicates that they had sympathy with a particular position and that they had begun the process of coming to a view. The courts' thinking was that having a preference for

something was different from demonstrating beyond doubt that one's mind was made up. The courts also recognised that Members would have firm views about issues which they would have to decide and might have expressed those views openly, this being legitimate, as long as Members did not go so far as to make it clear beyond doubt that they had a completely closed mind, which could not be shifted. The position was therefore that only strong evidence of a closed mind would amount to predetermination, and anything less in a local government context would amount to merely predisposition and therefore be legitimate.

The new rule applies if there is an issue about the validity of a decision and it is relevant to that decision whether a Member had or appeared to have a closed mind or was biased towards a particular matter and the matter was relevant to the decision. The rule now is that the decision maker is not to be taken to have had a closed mind just because she or he had previously done or said anything that directly or indirectly indicated the view the member took, or would, or might take.

In the majority of cases this will not change the law. However making it clear that a Member who indicates the view s/he would take can also now not be found to have predetermined a decision appears to take matters further than the previous position where such a stance was seen as too definitive and indicating what view s/he might take was as far as a Member could safely go.

This is legislation has caused some legal debate and will be closely looked at by the Courts when cases come before them. Given this the advice is to interpret this as the Government has suggested which is to see it as a codification of the common law and hence:

- that being predisposed to something is legitimate
- that demonstrating a completely closed mind before a decision is taken is something which could result in a legal challenge but only with

convincing evidence (and now arguably more than simply something said at some stage before the decision is taken) and that the burden of proof for someone alleging this is now very high

- that other factors despite the change in the law might result in a finding of predetermination such as agreement with others as to how a decision will be decided and being personally affected in some way by a decision could still result in a finding of bias.
- Clarity on just what the new provision will mean will need to wait until the first case under the new legislation has been decided. Until that time some caution is required although this new section has reinforced the common law position and arguably raised the bar on any challenge.