

PROTOCOL ON GOOD PRACTICE IN LICENSING FOR MEMBERS DEALING WITH LICENSING ISSUES

1.0 INTRODUCTION

- 1.1 The Licensing Act 2003 and the Gambling Act 2005 have put local authorities firmly at the centre of decision making upon licensing for regulated entertainment, the provision of alcohol, late night refreshment and the Licensing of Gambling Establishments and Small Lotteries.
- 1.2 There are two main aims of this protocol. The first is to provide guidance to, and enable, councillors to represent their constituents, whether they be residents, local businesses etc. by acting as 'interested parties' at licensing hearings. The second aim is to provide guidance to those Members who are members of the Licensing & Licensing Regulatory Committee (and their sub-committees); by following this protocol, Members will help to avoid accusations of pre-determination, bias or maladministration.
- 1.3 The role of Elected Members as part of the Licensing Committee will involve balancing the multiple needs and interests of the local community, whilst prioritising the four Licensing Objectives of the Licensing Act 2003 and the three objectives of the Gambling Act 2005. In doing so the Elected Member must maintain his/her impartiality and, as public perception of probity is critical, his/her appearance of impartiality too, during the decision making process. This protocol is intended to ensure that this is achieved.
- 1.4 This protocol is part of the Council's Constitution and all members and officers are expected to comply strictly with its provisions. Any breach of the protocol will be referred to the Monitoring Officer. If the breach is also a breach of the Code of Conduct for Members the matter will be dealt with accordingly.
- 1.5 This protocol is in addition to and takes account of the ethical framework introduced by the Local Government Act 2000 (as amended).
- 1.6 This protocol can be changed at any time by resolution of Council.

2.0 GENERAL ROLE AND CONDUCT OF COUNCILLORS

- 2.1 Councillors and Officers have different but complementary roles. Both serve the public but Councillors are responsible to the electorate, whilst officers are responsible to the Council as a whole. The Council's reputation as a successful Licensing Authority can only be based upon a mutual trust between councillors and officers and understanding of each other's positions. This relationship, and the trust which underpins it, must never be abused or compromised.
- 2.2 Legislation emphasises the overriding requirement that the public are entitled to expect the highest standards of conduct and probity by all persons holding public office and in particular that when dealing with licensing matters only issues relating to the licensing

objectives are taken into account and when dealing with gambling matters only issues relating to the licensing objectives of the Gambling Act 2005 are taken into account. There are statutory provisions and codes that set standards which must be followed if the public perception of the integrity of public service is to be maintained and improved.

- 2.3 Members must, at all times, comply with the provisions of the Code of Conduct for Members which has been adopted by the Council and sets out the required standards of conduct for councillors. The Code not only covers issues central to the preservation of an ethical approach to council business but also appropriate relationships with other members, staff and the public which will impact on the way in which members participate in the licensing process. Of particular relevance to councillors serving on the Licensing Committee and Panels is the provision which reads:

“Selflessness: Holders of public office should act solely in terms of the public interest”

- 2.4 Officers involved in the processing and determination of licensing matters must act in accordance with the Council’s Code of Conduct for Employees.

- 2.5 Despite the provision of the Code of Conduct for Members and the Code of Conduct for Employees, Members and officers involved in licensing matters should not accept any gifts or hospitality. If, however, a degree of hospitality is unavoidable it should be ensured that such hospitality is minimal and its receipt is declared as soon as possible. Members and officers should notify the Monitoring Officer of such hospitality. In all cases details must be entered in:

- The Members’ Register of Interest; or
- The Officers’ Register of Gifts and Hospitality

- 2.6 Officers must always act impartially.

- 2.7 The Council is committed to a culture of continuous improvement in all of its services and will ensure that all Officers and Members involved in the licensing process receive proper training/development to ensure that they are able to undertake their respective roles.

- 2.8 Members will be required to attend initial training/development sessions when first serving on the Licensing Committee/Licensing Regulatory Committee (normally within three months of appointment). Refresher training will be offered to members every year, and members will be required to attend. Members who do not participate in training will be excluded from serving on Licensing Panels determining licensing applications and other associated matters until the requirement has been met. If a Member fails to undertake any of the mandatory training within 12 months from the date on which it fell due, they will be considered to have resigned their position on the Licensing Committee (and Licensing Regulatory Committee) and the appropriate Group Leader will be notified that a vacant post requires filling.

- 2.9 Training will be delivered in a variety of ways so as to make it as accessible as possible for members. A combination of e-learning modules, one-to-one sessions and group sessions will be used. In addition to on-going training/development sessions, Members will be updated regularly on changes to legislation, procedures and policies.
- 2.10 Training/development courses will continue to be provided from time to time to ensure that Members maintain the necessary skills and expertise to fulfil the licensing functions to the best of their ability and in accordance with all relevant requirements.
- 2.11 Members of the Licensing Committee may be asked to serve on a Panel and will be required to attend all training/development sessions as detailed above.

3.0 REGISTRATION AND DECLARATION OF INTEREST

- 3.1 Members and Officers undertaking the Council's licensing functions have a duty to act fairly and without bias at all times and to be seen to be so doing. All steps should therefore be taken to ensure that their actions do not infer impropriety of any sort.
- 3.2 The Localism Act 2011 and the Code of Conduct for Members place requirements on Members about the registration and declaration of their interests and the consequences for the member's participation in the consideration of an issue, in the list of those interests. These requirements must be followed scrupulously and members should review their situation regularly. Guidance on the registration and declaration of interests may be sought from the Council's Monitoring Officer, although ultimate responsibility for fulfilling the requirements rests individually with each member.
- 3.3 A Register of Members' Interests is maintained by the Monitoring Officer and is available for public inspection and on the Council's website. A Member must provide the Monitoring Officer with written details of any disclosable pecuniary interests within 28 days of election or appointment to office. Any changes to those interests must be similarly notified within 28 days of the Member becoming aware of such changes.
- 3.4 The Localism Act 2011 requires that, unless a dispensation has been granted, a Member who has declared a disclosable pecuniary interest should not participate in any discussion or vote of the matter at a meeting. The Council's constitution also requires members to leave the room when such a matter is under discussion.
- 3.5 Members with a disclosable pecuniary interest may utilise any general dispensation given to members to speak in a public participation item, but will be required to leave the meeting for the remainder of the agenda item.

4.0 LICENSING SUB-COMMITTEES – BIAS AND PREDETERMINATION

4.1 Introduction

- 4.1.1 Bias has been defined as “an attitude of mind which prevents the decision-maker from making an objective determination of the issues that he/she has to resolve”. The important concept as regards bias is that there is no need for proof of actual or potential bias for there to be ‘procedural impropriety’ shown. It is sufficient that there is an appearance of bias. Accordingly, the test for bias is ‘whether a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility of bias’.
- 4.1.2 Further, where the decision to be made is quasi-judicial, as at Licensing Sub-Committee, the key issue to ensure the legality of the decision is to consider whether there may be a “public perception of a probability of unconscious bias”. This brings into consideration the previous dealings of Members of the Licensing Sub-Committee and views expressed by them. Members should therefore avoid participating as a Member of Licensing Sub-Committee where previous voting or statements of belief may alter that “objective impression conveyed”.
- 4.1.3 ‘Bias’ also includes the situation where it is felt the decision-maker has pre-determined the case upon his/her own prejudices. In the local government context, the most obvious example of pre-determination is where the impression is clearly given to persons (such as member of public or a lobbyist) beyond conveying a mere pre-disposition, that ‘the Member or authority will approach the matter with a closed mind and without impartial consideration of all relevant issues. In short, to avoid a claim of pre-determination, you must be able to say with honesty that your mind is open and that you will determine the matter on the evidence, regardless of any pre-disposition that you may have conveyed.
- 4.1.4 To help avoid accusation of pre-determination and ensure that Ward Members are free to represent their constituents as ‘interested parties’, Ward Members will not sit on Licensing Sub-Committee where that Sub-Committee is considering an application in that member’s ward.

4.2 Difference between the disclosable pecuniary interests provisions of the Code of Conduct, and Bias at Common Law

- 4.2.1 Bias at common law and disclosable pecuniary interests under the South Lakeland District Council Code of Conduct for Members are related but do differ as concepts and in their effect. Although the wording and apparent objectives are similar, the test for common law bias has a lower threshold. Bias at common law includes those areas where the potential Licensing Sub-Committee member has raised a real danger of a perception that s/he has prevented him or herself from being able to make an impartial determination of the issues. This is also known as fettering one’s discretion. Interests under the Code of Conduct, however, only concern themselves with the definition of a disclosable pecuniary interest as prescribed by legislation, and any other registrable interests that the Council has said should be declared.
- 4.2.2 In terms of effects, a Member who has a disclosable pecuniary interest may not, unless they have a dispensation, take part in the Licensing Sub-Committee or attend

the hearing at all. Whereas, a Member who has fettered his/her discretion through common-law bias may not sit as part of the Licensing Sub-Committee but may act on behalf of (or as) an 'interested party'.

5.0 APPLICATIONS SUBMITTED BY THE LOCAL AUTHORITY

- 5.1 The Council could apply for their own Premises Licences. Such applications must be, and be seen to be, dealt with fairly. During such an application process it is therefore important to be aware of any potential appearance of bias.

6.0 LOBBYING OF/BY COUNCILLORS

- 6.1 Local democracy: The Licensing Act 2003 and The Gambling Act 2005 set out the grounds for making representations on licence applications and limits the parties which may make such representations. It should be borne in mind that one of the key aims of the Licensing Act 2003 and the Gambling Act 2005 is to localise decision making or 'democratise' the process and members are therefore legitimately concerned with their locality and the needs/wishes of its constituents, including both the needs for entertainment and employment, as well as the undesirability of crime and public nuisance. Local councillors can either sit as part of the Licensing Committee/Sub-Committee or can represent the interests of their constituents by acting as 'interested parties', as long as they do not have any disclosable pecuniary interest in the matter.
- 6.2 The Code of Conduct: If the matter to be decided at a licensing hearing relates to the Member's membership of a lobby or campaign group, an interest should be declared in line with the principles detailed within South Lakeland District Council Code of Conduct. This might, for example, include a situation where the Member is a part of campaign group which promotes rural pubs and the licence application requires a licence for such a premises. Whilst the Code of Conduct does not require the Member to withdraw from a meeting unless there is also a disclosable pecuniary interest, so as to avoid perceptions of bias in such a situation the Member shall not sit on the Sub-Committee determining the application. However, this would not preclude the Member attending the meeting either as the licence applicant, or being/representing an 'interested party'.
- 6.3 As stated earlier in this Protocol, unless a Member has a dispensation, if they have a disclosable pecuniary interest in a matter then they must not be present in the meeting in any form. Should s/he be the licence applicant or be/represent an 'interested party' then an agent should be utilised at the meeting instead, to present the member's view.
- 6.4 It should be noted that regulatory matters such as licensing are particularly sensitive. Members should adopt a particularly cautious approach to such matters.

6.5 Appearance of bias: Whilst lobbying of members is legitimate and certain members may take representations to the Licensing Committee/Sub-Committee on behalf of 'interested parties', it is crucial for the Licensing Authority and its Committee/Sub-Committee to ensure that there is neither actual nor the appearance of bias in its decision making.

6.6 To avoid an appearance of bias:

- No Member sitting on the Licensing Sub-Committee can represent one of the interested parties or the applicant. If s/he wishes to do so s/he must excuse him/herself from membership of the Sub-Committee which is considering the application and address the Sub-Committee as an 'interested party' or as the applicant's representative/witness.
- If a Member who sits on the Licensing Sub-Committee is approached by persons wishing to lobby him/her as regards to the licence application then that Member must politely explain that they cannot discuss the matter and refer the lobbyist to his/her Ward Member or the Licensing Officer who can explain the process of decision making. If the Member who sits on the Licensing Sub-Committee wishes to represent them then s/he will need to excuse him/herself from the Licensing Sub-Committee.
- Political group meetings should never be used to decide how any members on the Licensing Sub-Committee should vote. The view of the Ombudsman is that using political whips in this manner may well amount to findings of maladministration.
- Councillors must not be members of the Licensing Committee/Sub-Committee if they are involved in campaigning in respect of the particular application being considered.
- Other members (i.e. those which do not sit on the Licensing Sub-Committee) need to be careful when discussing issues relating to matters which may come before the Licensing Sub-Committee members as this can easily be viewed as bias/pressure and may well open that Sub-Committee Member to accusations of such.
- Members must not pressurise Licensing Officers to make any particular decisions or recommendations as regards applications (such as the ability to decide whether a representation is frivolous or vexatious). This is also reflected in the Member and Officer Protocol contained within the Council's Constitution.

6.7 It should be noted that a Member for a ward, which would be directly affected by the application, is most at risk of being accused of bias. Such members are also most likely to be put under pressure to represent local 'interested parties' (i.e. objectors/supporters) or indeed 'responsible authorities' as regards a licence application. It is for this reason that, whilst there are no statutory requirements for ward members to excuse themselves from such a licence application, those whose ward is likely to be affected by the application will not sit on the Licensing Sub-Committee considering the application but s/he may wish to act as/or represent an 'interested party'.

7.0 PRE-APPLICATION/PRE-DECISION DISCUSSIONS

7.1 Discussions between the licence applicant and the Licensing Authority prior to the submission of an application (or prior to a decision being made) are often helpful to both parties. For example, a premises licence applicant may ask for advice on how to complete an 'operating schedule'. However, discussions with a member of the licensing committee can often be viewed by objectors as a form of lobbying and the elected member must ensure that they do NOT take part in any pre-application/pre-decision discussions and that applicants are referred to the Licensing Officer.

8.0 ROLE OF THE LICENSING OFFICER

8.1 Licensing Officers have no ability under the Gambling Act 2005 to make representations or to be party to the hearing. This is different for the Licensing Act 2003 as the Licensing Officer or the members of the licensing team can act as a responsible authority on behalf of the Licensing Authority. If this happens segregation needs to take place between the two roles and for this process to be transparent.

There is no legal provision for Licensing Officers to make recommendations to the Licensing Sub-Committee in terms of the outcome of the Committee hearing as is seen in planning cases. However, a summary report of the application, the representations, and the Officer's comments as to how these relate to the Licensing Act 2003, the Gambling Act 2005 and the Guidance and the local Licensing Policy Statement and/or Gambling Statement of Principles, may be provided.

9.0 DECISION MAKING

9.1 Reasons for decisions made must be clearly documented so that those affected can understand why the decision was reached. It is critical that such reasons demonstrate that the decision has been made according to the Licensing Objectives of the Licensing Act 2003 and The Gambling Act 2005 as well as the Licensing Authority's Licensing Policy Statement and Gambling Statement of Principles. Whilst the Government's Guidance accompanying the Licensing Act 2003 indicates some other factors which may influence decisions (e.g. live music/cultural considerations) these will always be subservient to the Licensing Objectives and the Licensing Policy Statement and Statement of Principles.

10.0 SITE VISITS

10.1 A Member of the Licensing Sub-Committee appointed to consider a licensing application may request a site visit. A request must be in writing and state the reasons for requesting a site visit which must be one of the following:

- A site visit would assist the Licensing Sub-Committee to assess the impact that the premises might have on premises of interested parties and the submitted plans are not capable of doing this;
- A site visit would enable the Sub-Committee to assess the internal layout of premises and the submitted plans are not capable of doing this; and
- There are other exceptional circumstances which, following consultation with the Licensing Officer, it is considered appropriate to undertake a visit.

10.2 On the request of a Sub-Committee Member the Licensing Officer will decide whether or not to hold a site visit after consultation with the other two Sub-Committee members.

10.3 When a site visit is to be undertaken they shall be conducted in the following way

- The Licensing Officer will, where necessary, make arrangements for the inspection of the premises with the applicant;
- The visit will take place after the meeting has opened.
- The site visit will be chaired by the Sub-Committee chair, but it will not be a formal meeting;
- Licensing Officers will attend to advise and answer questions;
- Upon arrival at the site, members will receive an introductory briefing from the Licensing Officer about the site, the proposal and the reason for the visit;
- Members will view the application and the submitted plans;
- On site discussions will relate solely to the purpose of the inspection. Formal consideration of all the issues relevant to the application takes place at the Sub-Committee hearing;
- No communication will take place between members and any other parties save for the Licensing Officer. There will be no discussions on the merits or otherwise of the application; and
- Members who have not been able to attend the site visit will not be able to participate in the Sub-Committee hearing, unless they are familiar with the site.