

Croydon Council

For General Release

REPORT TO:	ETHICS COMMITTEE 8 February 2016
AGENDA ITEM NO:	8
SUBJECT:	RECENT CASE LAW INVOLVING MEMBER APPARENT BIAS AND ITS IMPACT ON COUNCIL DECISIONS
LEAD OFFICER:	COUNCIL SOLICITOR, DIRECTOR OF LEGAL AND DEMOCRATIC SERVICES & MONITORING OFFICER
CABINET MEMBER:	
WARDS:	ALL
CORPORATE PRIORITY/POLICY CONTEXT:	The Council has determined that the Ethics Committee shall be responsible for receiving and considering reports on matters of probity and ethics and to consider and recommend revisions to the Code of Conduct.
FINANCIAL IMPACT	Implementation of the recommendations contained in this report shall be contained within existing budgets
FORWARD PLAN KEY DECISION REFERENCE NO.:	N/A

1. RECOMMENDATION

The Committee is asked to:

- 1.1 Note the outcome of recent case law in relation to the impact of apparent bias on the part of a Member on a planning decision

2. EXECUTIVE SUMMARY

- 2.1 This report provides details of the quashing of a planning decision by the High Court due to the apparent bias of one of the Members of the planning Committee.

3. DETAIL

- 3.1 In *Kelton v Wiltshire Council* [2015] EWHC 2853 (Admin) the claimant was seeking to challenge the grant of permission by Wiltshire Council on 21 January 2015 for a scheme of up to 35 custom built residential dwellings, including nine affordable homes, on land near the River Wylde, Warminster, Wiltshire.
- 3.2 The claimant was a land owner, living approximately 700 metres downstream from the proposed development. The interested parties were HPH and HAB Housing, the applicants for planning permission. Also featuring in the case was

Selwood Housing Association (“Selwood”), a not for profit association which had an interest in the affordable housing part of the development.

- 3.3 The matter came before the High Court as a judicial review and whilst the review was advanced on four grounds, it was only the first, pertaining to the alleged bias/predetermination of one of the Councillors on the planning committee which was upheld by the Court’s decision.
- 3.4 The applicants alleged that the participation of one of the councillors on the Council’s planning committee, Councillor Magnus Macdonald, whose vote carried the decision in favour of granting the outline planning permission, meant that the decision to grant outline permission should be quashed. It was alleged that he was disqualified from participating in the planning committee on this matter, because he was a director of Selwood which had had an interest in the affordable housing part of the development. Cllr. Macdonald received, as director, some £3000 per annum.
- 3.4 The Councillor’s involvement was challenged on three grounds. Two of the grounds for challenge failed, however the third was successful.
- 3.5 The first challenge was based on the rule of automatic disqualification for financial interest. The argument was that Cllr. Macdonald was automatically disqualified as a result of his directorship of Selwood. Selwood was involved in the application and had an interest in its fate given that the applicants for planning permission had identified it as, effectively, their affordable housing partner.
- 3.6 On this first ground, Cranston J held that Cllr. Macdonald had no direct pecuniary or proprietary interest in the planning application so as to be automatically disqualified from participating in the decision. The decision of the committee in the present case did not lead to Cllr. Macdonald obtaining any benefit. The Judge considered there were too many contingencies between the committee’s decision and any benefit to the Councillor as a director of Selwood for the rule as regards pecuniary or proprietary interest to have any purchase. Here Selwood was not a party to the decision. Therefore Cllr. Macdonald could not be regarded as promoting the cause of affordable housing through his voting on planning permission on this application.
- 3.7 The second challenge was statutory disqualification as a result of a disclosable pecuniary interest, contrary to Section 31 of the Localism Act 2011 and the Schedule to the Relevant Authorities (Disclosable Pecuniary Interests) Regulations 2012.
- 3.8 The argument was that, under Section 31, Cllr. Macdonald had a disclosable pecuniary interest in the matter before the planning committee. He was aware that Selwood stood to benefit directly from the grant of permission and accordingly was statutorily disqualified from participation in the meeting and should have withdrawn.

- 3.9 In the Judge's view, however, Cllr. Macdonald had no disclosable pecuniary interest in the matter to be considered. Selwood was not the applicant for planning permission and at the point of the decision had no contract with the developers. It may have built up goodwill with its advice to them over a period, but at the time of the grant of planning permission the affordable housing part of the development was yet to be tendered. In the result, Cllr. Macdonald was not disqualified under Section 31.
- 3.10 Apparent bias was the third challenge. Cranston J's view was that Cllr. Macdonald's participation in the decision to grant planning permission gave rise to an appearance of potential bias. It was plainly in Selwood's interests and Cllr. Macdonald's, as director, for the application to be approved. The reasonable and fair-minded observer, having the background facts, would have been aware that Selwood had committed time, resources and expertise to working with the developers over the design of the affordable housing part of the scheme.
- 3.11 The judge noted evidence from the development director of Selwood that it had not made a final decision to bid for the scheme but noted that it was highly unlikely that Selwood would have gone to all the trouble it did unless it was seriously interested in delivering the affordable housing part of the scheme and had reason to believe that it stood a good chance of winning the tender once planning permission was granted. It had built up goodwill with the developers. The evident reality of the position then was that although it was not a done deal, Selwood was the front runner to deliver the affordable housing part of the scheme and would, barring something unforeseen, be appointed to do so in due course.
- 3.11 One element of the challenge on Cllr. Macdonald's participation was that he participated in a decision which furthered the cause of affordable housing, which as a member of Selwood he obviously supported, but that was only part of it. The important distinction is that as a director of Selwood he also had a private interest.
- 3.12 In Cranston J's view, Cllr. Macdonald's directorship of Selwood would not be an issue in the great majority of housing applications likely to come before the committee, even those with an affordable housing element. The position in this case was quite different. Selwood, with Cllr. Macdonald as a director was not simply an affordable housing provider. Here it was the only provider which had been willing to give assistance on the scheme, had expressed a clear interest in delivering it, had been named by the applicants as their potential partner, and had written in support and attended the planning committee meeting when it was considered. In other words, its position was superior to that of any other interested providers of affordable housing because of its previous involvement and its prospects of winning the contract when the affordable housing part was tendered. Because of that, Cllr. Macdonald's private interests were engaged, as a director of Selwood, not just his interests in the cause of affordable housing.

- 3.13. In all these circumstances the Court found it was wrong for Cllr. Macdonald to have participated in the meeting and the outline planning decision was quashed by the Court as a result.
- 3.14. Members will note that actual bias on the part of the Councillor Macdonald was not found to exist, yet the apparent bias as described by the Court was sufficient to negate the decision taken by Wiltshire Council.

4. FINANCIAL AND RISK ASSESSMENT CONSIDERATIONS

- 4.1 There are no direct financial implications arising from this report.

5. LEGAL IMPLICATIONS

- 5.1 There are no direct legal consequences arising from the contents of this report beyond those set out in the body of the report.

CONTACT OFFICERS:

Gabriel Macgregor,
Acting Director of Legal and
Democratic Services and Monitoring
Officer (ext 64036)

BACKGROUND DOCUMENTS:

None