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Authority Alert

Determination of controversial issues in the run-up to a local election – common sense prevails again

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Monitoring officers and councillors can once again heave a sigh of relief with the Court of Appeal's decision to overturn the High Court's surprising and inconsistent ruling on decisions taken during the pre-election "purdah" period.

Mr Lewis had challenged the decision of Redcar and Cleveland BC to grant permission for a controversial planning development on land owned by the local authority, claiming that there was an appearance of bias and predetermination on the part of the Coalition members of the Planning Committee who had all voted in favour of the development. The High Court judge quashed the decision on the basis that a fair minded and informed observer would conclude there was real possibility of bias and predetermination, particularly as the committee meeting was held during the run up to a local authority election.

On 1 July 2008 in **R (Lewis) v Persimmon Homes Teesside Ltd [2008] EWCA Civ 746**, the Court of Appeal robustly rejected the judge's reasoning and allowed the developers' appeal. The court found that there was little evidence of actual predetermination, as opposed to legitimate predisposition on the part of the members of the Planning Committee. Thus, there was no evidence that the voting at the meeting had split along party political lines nor that members of the committee were any more politically motivated than would normally be expected from elected policy makers. But the court went on to say that the notion that a planning decision was suspect because all members of a single political group had voted for it was an unwarranted interference with the democratic process.

Nor was there any evidence that the imminence of the local elections influenced the decision making or showed that the members had minds closed to the planning merits. The Monitoring Officer had considered the Council's Guidance Note on Publicity regarding meetings held during the pre-election period and had formed the opinion that the purpose of the guidance was to prevent activities which were controversial in the sense of assisting election candidates or parties with their campaigns, which he did not consider this planning decision to do. Even if he had advised against it, the failure by a committee to follow advice given by the local authority to its own staff would not, on its own, invalidate an otherwise valid planning permission.

In this case, the planning application was a long running scheme that had been subject to lengthy and detailed consultation before it reached the Planning Committee. The time for the decision happened to fall within the purdah period for exceptional reasons and no fair-minded and informed observer would infer that there was a real possibility that, because the decision was taken at one time rather than another, the councillors concerned in the decision were any more or less open-minded than they would have been had the decision been taken at another time.

After reviewing the case law on bias and predetermination, the court distinguished between actual predetermination, of which there was no evidence, and apparent predetermination, in which the notional fair-minded observer would conclude that there appeared to be a real risk of predetermination. The court said that the test for apparent predetermination by a decision maker in a situation of democratic accountability is a very different one from that to be applied to those in a judicial or quasi-judicial position. Such decision makers were not required to be impartial but to address the planning issues before them fairly and on their merits, even though they might approach them with a predisposition in favour of one side of the argument or the other. The appearance of bias or predetermination requires something more than political affiliation or adoption of policies towards a planning proposal.

Had the High Court judgment stood, it would have seriously hampered local authorities in conducting their ordinary business particularly in the run up to an election. The Court of Appeal has recognised the reality of local authorities with party groups, and its judgment provides authorities and members with a clear basis on which to conduct ordinary local authority business.