

2008

Ensuring Unbiased Democratic Council Decision Making

Principles to Guide Good Practice

September 2008

Published by Local Government Victoria
Department of Planning and Community Development
55 Collins Street, Melbourne Victoria 3000
Tel: 03 9651 7026
<http://www.localgovernment.vic.gov.au>

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Minister's Foreword

Councillors play a central role in influencing the wellbeing of their local communities, and council decisions can have far reaching impacts not only on whole communities but also individuals. As elected representatives, councillors will hold - and are required to form - opinions on issues that come before them in the course of their deliberations. This is a natural expectation of democratic decision making. However, it is also expected that, when considering matters that may adversely affect others' rights, interests or legitimate expectations, councillors bring an open mind to those matters free from the apprehension of bias, and are open to persuasion notwithstanding their previously held and expressed views on the subject.

As recent court rulings have demonstrated, council decisions can run the risk of being challenged and ultimately overturned if it is found that a councillor involved in the relevant decision had prejudged the matter and was not open to persuasion.

This Guide provides valuable assistance to councillors in understanding the common law rule relating to bias and identifying whether the rule may apply to them when making decisions in particular instances. The Guide also offers suggestions on how councillors can ensure that their actions are free from, and are seen to be free from bias, and provides practical steps to take if a councillor is of the view that the rule of bias may apply.

I encourage all councillors to make use of the Guide on this important issue.

A handwritten signature in blue ink, reading "Richard Wynne". The signature is written in a cursive, flowing style.

Richard Wynne MP
Minister for Local Government

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A Twin strengths of Australia's system of government

Australia's system of government includes two important elements that we all value:

- The ability freely to democratically elect those who will represent us and to whom we entrust powers to make decisions that will affect our lives and interests and those of our families; and
- The rule of law that operates to ensure that when exercising the powers given to them, our elected representatives act fairly and in accordance with the law.

These important aspects of our system of government operate for each of our tiers of government - Federal, State and Local.

B Legal constraints on the exercise of government power

Ministers in the Federal Government must comply with the Australian Constitution, the terms of legislation enacted by the Australian Parliament, and the common law of Australia. Their actions are subject to review by the Federal and High Courts.

The Victorian Government and each of Victoria's 79 councils must abide by the Victorian Constitution and by the legislation of the Victorian Parliament. They must also act in accordance with the common law. The actions of Ministers, State government officials and Victorian councils are subject to review by the courts to ensure compliance with relevant legislative requirements and the principles of the common law.

C Decision making in a democratic context

Under our democratic system we entrust certain powers and privileges to our elected representatives, but in so doing we require that, as our representatives, they act differently to the way they would act as individuals.

One of the things that we require is that they act in the interests of the community as a whole and not in their own self interest. We require them to be scrupulous in the way they make decisions on our behalf and act reasonably and fairly in a way that ensures public confidence that our laws are not only administered justly but that their administration is seen to be just.

Over many years the courts have developed rules to ensure that decision makers at all levels of government act fairly and without bias when making decisions that affect the rights and interests of others. These rules are known as the common law rules of “natural justice” or “procedural fairness”.

The expression “natural justice” conveys the notion that decision makers will fairly treat those affected by their decisions. To put it more simply, that there will be “fair play” or a “fair go”. The common law seeks to ensure fair treatment by ensuring that the procedures used to make decisions are fair - hence the term “procedural fairness.”

There are a number of aspects to these common law rules. This document is aimed at assisting councillors to comply with **one** aspect of those rules – the rule that they bring an impartial and open mind to the task of making decisions that affect the rights and interests of others.

D Implications for local councillors as decision makers

At the local government level, we elect individuals who are active within the community, who have and who express views about issues relevant to the community and which may be controversial. This closeness to the community of which they are a member can raise particular issues for councillors.

Victorian councils are given powers under various Acts of the Victorian Parliament, including the *Local Government Act 1989* and the *Planning and Environment Act 1987*. These Acts authorise councils to make decisions that affect the rights and interests of individuals and businesses living and operating within a council's municipal district.

Section 90 of the *Local Government Act 1989* (the Act) requires a councillor to vote at council meetings unless prohibited from so doing by a provision of the Act. Part 4 of the Act contains provisions to prevent councillors with a conflict of interest from participating in certain council decisions.

The provisions of the Act however also operate within a framework of common law principles that bind all governmental decision makers. For Victorian councillors as decision makers this means that **in addition** to the provisions of the Act they must observe the common law rules discussed in this document. It also means that those common law rules override an individual councillor's statutory obligation to vote with the effect that a councillor who cannot genuinely comply with those rules in relation to a particular matter, must refrain from taking part in a council decision about that matter. Note that this Guide concerns the common law rules and not the statutory provisions relating to conflicts of interest.

E What types of decisions are affected?

The common law rules, as they apply to councils, recognise that council decision making takes place within a democratic and political context. The rules are **not** concerned with council decisions that affect members of the municipality generally.

The rules are **not** concerned, for example, with a council decision to impose a rate or a charge for services provided to ratepayers generally. Decisions of this sort affect the community as a whole. The way a council is held accountable for these decisions is through the democratic process of regular council elections.

What the common law rules are concerned with are decisions that have the potential to affect the rights and interests of a person, a business or a corporation specifically and in a way that is greater and more direct than the effect the decision might have on the community as a whole. These sorts of decisions can be described as **administrative decisions** to distinguish them from the broad policy decisions made by councils that apply generally throughout the community.

Examples of administrative decisions that must comply with the common law rules are:

- A decision to grant or refuse a planning permit for a specific project;
- A decision to make an alteration to the application of a planning scheme to a particular area of land owned by an individual or corporation;
- A decision to exempt a person from complying with the provisions of a local law.

In each of these cases, the council's decision will have a direct detrimental or beneficial effect on the person wanting to carry out the project, make use of the piece of land or carry out the activity which is the subject of the local law. In each case that effect will be greater and more immediate than the effect of the decision on the community as a whole.

It would not be fair or reasonable to expect someone (whether the applicant or a neighbour) so directly affected by a council decision to wait until the next council election if they wished to challenge the particular council decision. The common law rules are designed to make councils immediately and directly accountable for how they make administrative decisions that immediately and directly affect the rights and interests of individuals and corporations.

F What is required of councillors?

The common law rules of natural justice or procedural fairness require councillors to approach their administrative decision making with an open mind to ensure that they act fairly and impartially, in good faith, listening to both sides of any argument that is put to them for consideration.

G Having an open mind does not mean having an empty mind

It is integral to the democratic and political processes by which councils are elected that councillors will form views about matters of public policy and issues of concern and interest affecting the municipality. Councillors will often develop strong personal views as to what ought to occur in the community, as to how they wish their community to develop and the desirability of particular types of developments or other activities proposed within the municipality. These views may make them predisposed to favour particular policy outcomes.

The common law rules recognise that councillors will often form a preliminary view and bring a pre-disposition or an inclination towards a particular outcome to an administrative decision making process. The common law rules allow councillors to express their own views, as long as they are prepared to reconsider their position in the light of all the evidence and arguments.

This means that it is legitimate for a councillor to bring a predisposition in favour of a particular point of view to the process of making a particular administrative decision, **so long, and only so long**, as he or she also retains an open mind and remains prepared to listen to any contrary argument, weigh up a range of competing values and perspectives, and be open to be persuaded by those who hold contrary views. A councillor does not have to be persuaded in all cases of the correctness of a contrary view, but he or she **must** give that view full consideration before rejecting it.

H Indications of an open mind

To monitor that he or she has brought an open mind to a particular administrative decision making process an individual councillor should ask his or herself: -

- Am I genuinely prepared to listen to all the arguments and to take all relevant matters into account?
- Despite my preference for a particular outcome, am I still capable of having an open mind concerning the merits of the issue as a whole?
- Have I considered all the various options and individual views presented?
- Have I weighed up both the merits and the objections in relation to a particular matter?
- If I have a preference for the decision to be one in favour of, or against, the matter before the council, have I genuinely, honestly and fairly heard the objections and any alternative views to see if they can be accommodated before I make my final decision?

I Why is it wrong for a councillor to bring a closed mind to council administrative decision making?

Put yourself in the position of a resident objecting to a proposed development, or a developer wanting to undertake a major project within that municipality. Each has genuine concerns and interests. Each relies on the processes set out in legislation that allow them to lodge an objection or to initiate a proposal. Each expects that they will be treated fairly and their views will be given proper consideration. Neither expects that when making their proposals or objections they are doing so to a decision making body whose members have already come to an irreversible position regardless of the arguments they make or the evidence they present. If councillors in fact approached their decision making responsibilities in such a manner, they would not be carrying out their duty as a councillor to participate in the decision making which is part of the democratic process.

J How can we tell if a councillor has brought a closed mind to an administrative decision making process?

1. A councillor's own conscience

A councillor will fail to bring an open mind to a particular administrative decision making process if he or she:-

- Closes their mind to the consideration of all relevant factors because they have already reached a particular decision before weighing up those factors;
- Is so committed to a conclusion already formed as to be incapable of altering their view, whatever evidence or argument may be presented;
- Has so prejudged the issue that any representations at variance with the adopted view would be futile;
- Before taking part in the decision making process has expressed a final opinion on the matter which cannot be dislodged.

Every councillor has a responsibility to bring a genuinely open mind to council administrative decision making processes. On one level, the fulfilment of this responsibility is a matter for the individual conscience of each councillor. Each must ask his or her self:

- Have I have acted justly and fairly in accordance with the law?

2. Objective test

It is of fundamental importance that the public have confidence in the administration of justice. However, because it is important not only that justice be done but that it be seen to be done, the courts have developed rules aimed at preserving public confidence in the decisions of those who exercise public power on behalf of the community that do not only rely on the individual consciences of decision makers.

Because it is not possible to look into the mind of an individual councillor, the courts have developed an objective test for examining the actions of councillors that is designed to protect the administrative decision making process from being tainted by what is referred to as an “apprehension of bias” – that is, a fear or suspicion in the public’s perception that a councillor has not brought a genuinely open mind to his or her decision making responsibilities.

K What is the test applied by the courts?

The test that a court will apply is to ask the question:

Would the facts relating to a council’s decision making process in relation to a particular administrative decision give rise to a reasonable apprehension or suspicion on the part of a fair-minded and informed member of the public, knowing those facts and observing the process, that the process was not impartial and the decision had not been made with an open mind?

What the courts are concerned with is how the administrative decision, and the process of arriving at it, appear to the persons affected and to the public, judged reasonably and objectively.

There are two reasons for this. The first is a view that if the processes and procedures relating to a particular administrative decision are fair, it is likely that the decision represents a just and fair conclusion. The second is the way administrative decision making processes appear to the community will affect the level of confidence that community has in the integrity of those processes. These considerations apply to administrative decisions at all levels of government, not just local government.

The maintenance of public confidence in the administrative decision making process is an important part of the maintenance of broader public confidence in the democratic process more generally and in the ability of members of the community to entrust roles and responsibilities to their elected representatives.

L Creating a perception of a lack of an open mind

An individual councillor could create a perception of bias if he or she acts in a way that gives the impression that they have already made their mind up as to what the outcome of the administrative decision making process should be and do nothing to indicate that they are capable of being persuaded by any further argument or by debate through the collective decision making processes of council.

As an elected representative, a councillor may participate in initial discussions between a developer and the municipality. It is also appropriate that residents for or against a proposed development should feel free to discuss it with their councillor and that the councillor should be free to express an initial reaction without running the risk of being disqualified from subsequent participation in the administrative decision making process.

However, a councillor steps away from their role as an elected representative if they also attempt to participate in an administrative decision making process both as an individual and as a councillor. This would be the situation, for example, if a councillor lodged an objection to a specific planning application or a proposed planning scheme amendment using the processes available to the community generally but then later also participated in the council's decision making processes on the outcome of that application or proposed amendment.

If as an individual a councillor chooses to make an application to council or lodge an objection, the material he or she presents becomes part of the material that the council is required to consider as part of its administrative decision making process. Such actions will raise in the mind of those observing the process the apprehension that, when exercising administrative decision making powers as a councillor, he or she is committed to the position set out in the material they presented as an individual. A fair-minded and responsible observer might reasonably assume that the councillor had closed his or her mind to the possibility of doing other than voting in accordance with that position.

Just as Australians regard it as important that justice be done and be seen to be done, we also regard it as important that those who make submissions relating to an administrative decision do not also make that decision.

By taking part in a decision making process in both capacities, a councillor risks giving rise to a perception in the community that he or she has pre-judged an issue and has not brought an open mind to their responsibilities as the community's elected representative.

If a councillor feels so strongly about a specific issue that is before council for decision that he or she must pursue it as an individual then he or she should refrain from also taking part in the council's decision making process in their capacity as an elected representative.

M Consequences of biased council administrative decision making

It is important for a council's administrative decision making process to be seen as fair if public confidence in the process is maintained. Such confidence is an important part of the maintenance of broader public confidence in all the council's democratic processes.

Good administrative decision making practice requires that council decisions be made properly, openly, impartially and for justifiable reasons. Failure to adopt good practice could risk a council's decision being subject to legal challenge with all the associated costs and uncertainties. A decision that is affected by bias is open to challenge as not being of full and lawful effect. If such a challenge is upheld by a court then the council's decision will be set aside as being of no effect.

The failure of one councillor to bring an open mind to an administrative decision making process, or a public perception of bias on the part of one member of council, can put the lawfulness of a decision at risk even if all other councillors who took part in the decision were free of bias. It may not be sufficient in any particular case to try and argue that the vote of one biased councillor could not have changed the effect of a decision made by the council as a whole. The presence of one councillor about whom an allegation of bias can be made, can be sufficient to cause a court to reach a view that the whole decision making process was unlawful.

If each councillor acts properly, the council's administrative decision making processes will be lawful and justifiable. For this reason, this document is directed to guiding the conduct of each individual councillor. However, all councils and councillors should be aware that a council acting collectively in reaching a position can also act in a way that gives rise to a public perception that it has predetermined the outcome of an administrative decision making process.

The Appendix to this document sets out, as case studies for consideration by councils and councillors, two actual cases in which the Supreme Court of Victoria found that a council's administrative decision making process was unlawful - in one case due to the actions of an individual councillor and in another by the actions of the council as a whole.

N Being proactive to protect the integrity of council administrative decision making

In all their actions councillors should take care to be aware of the perception they may be creating in the minds of those observing and affected by a council's administrative decision making processes. Candidates for office as councillors should also bear the common law rules in mind when expressing policy positions and arguing for or against particular policy outcomes. Both councillors and candidates should take care to ensure that statements they make are not of such particularity about specific proposals that will later exclude them from taking part in the council's decision making processes concerning those proposals.

A council or individual councillor who is uncertain as to whether previous or proposed comments or conduct could give rise to a perception of bias, should seek legal advice based on the details of the specific situation as each case needs to be considered on its facts.

A councillor who, in the period leading up to a meeting of the council or of a council committee, has made comments or engaged in conduct that could give rise to a public perception that he or she has already made their mind up about a particular administrative decision to be considered at that meeting, should make a statement to the meeting prior to commencement of consideration of the item:

- explaining their predisposition and the reasons for it; AND
- advising that despite having that predisposition, he or she is nevertheless willing to hear and consider all contrary arguments and positions before making a final decision.

That statement should be recorded in the minutes of the meeting.

Such a statement serves to make it clear to those concerned that the councillor involved brings an open mind to the administrative decision making process.

A councillor who is pre-disposed towards a particular administrative decision outcome should **only** make such a statement if he or she is genuinely prepared to consider contrary positions and arguments and to make a decision contrary to his or her predisposed position if so persuaded by those contrary positions and arguments.

Having made such a statement the councillor concerned can then take part in the council's consideration and discussion of the relevant issues and can take part in any vote, including moving or seconding a motion on any question relevant to the decision making process.

If a councillor is in fact unwilling to move from his or her pre-disposed position despite anything that may be put to them as part of the council's administrative decision making process, then that councillor should **not** take part in that process.

In such circumstances, at the relevant meeting the councillor concerned should inform the meeting that because he or she has predetermined the decision to be made, they will not take any part in the decision making process. This would include not participating in any discussion or vote, or moving or seconding a motion on any question relevant to the matter. The statement should include sufficient details on the nature of the predetermination and the reasons for it. The statement should be recorded in the minutes of the meeting.

It would be an abuse of process and undermine the democratic basis of local government if a councillor was to deliberately set out to invalidate a council decision by initiating a situation where his or her bias infected it.

It is important to note that any consideration of a councillor's potential bias on a matter does not override a councillor's statutory obligations in relation to any conflict of interest they have in that matter. If a councillor has a conflict of interest under the Act, he or she must take necessary actions mandated under the Act in all circumstances.

O Conclusion

The democratic processes involved necessarily mean that people with a wide range of views and from different sections of the community, will be elected as councillors. However, once elected, councillors have an overriding duty to act in the interests of the community as a whole. One of these duties is to act fairly and with a genuinely open mind when making administrative decisions.

Good democratic administrative decision making involves weighing and balancing all relevant factors and taking into account a range of views. The common law rules about open minded decision making have been developed by the courts over many years to uphold high standards of justice and fairness in official decision making in Australia.

Before becoming involved in a council's administrative decision making process in relation to a particular matter, a councillor should ask his or herself if they are genuinely prepared to listen to all the arguments and to take all relevant matters into account. If they cannot answer YES to that question then they must refrain from taking part in the decision making process concerning that particular matter.

While taking part in each and every council administrative decision making process each councillor should be able to genuinely answer YES to this question:

Have I treated those affected by the outcome of the council's administrative decision making process with the care and respect I would want shown to me if my own rights and interests were affected?

Appendix

Case Study One

Actions of an individual councillor

Winky Pop Pty Ltd & Anor v Hobsons Bay City Council Decision of the Supreme Court of Victoria 16 November 2007

The case involved a proposed planning scheme amendment relating to a strategic redevelopment area. The council published a notice of the proposed amendment and received a number of submissions in response. One of the elected councillors subsequently also lodged a submission with the council. At the council meeting convened to consider the submissions and a motion to refer those submissions to a panel, that councillor declared a conflict of interest but did not specify the nature of that interest. The councillor concerned did not take part in the council's vote to refer the submissions, including that lodged by the councillor, to a panel.

The councillor concerned appeared before the panel as a submitter and made a series of submissions contending for a particular outcome including the exclusion of a particular parcel of land from the strategic redevelopment area. When the council convened to consider the panel's report the councillor participated in a series of votes, voting in accordance with the submissions the councillor had made to the panel. The effect of these votes was to exclude the particular parcel of land from the strategic redevelopment site in accordance with the position supported by councillor. The owner of the affected land brought legal proceedings against the council on the basis that the councillor concerned had prejudged the issue and that, as a result, they had been denied procedural fairness. The action was successful. The Supreme Court of Victoria finding that the actions of the councillor concerned had created a perception that that councillor had prejudged the issue and that the involvement of that councillor was sufficient to render the council's decision as a whole unlawful.

Case Study Two

Actions of a council as whole

Bycon Pty Ltd v Moira Shire Council Decision of the Supreme Court of Victoria 11 August 1998

Council staff were approached about a site for a proposed supermarket development. The site consisted of a number of individual parcels of land, some privately owned and one owned by the municipality. Both the commissioners (who at that time administered the council) and council officers expressed support for the proposed development, which support was set out in a series of correspondence between the municipality and the property developers. The commissioners subsequently went out of office and an elected council took over governing the municipality. The new council continued the level of support that had been demonstrated by the commissioners and by council officers.

Part of the proposed development involved the council selling the parcel of land it owned within the development site to a company controlled by the property developer. A change to the zoning was also required. The zoning change was advertised in accordance with the relevant legislative provisions and the change effected. However, the council engaged in negotiations to sell its land to the property developer and resolved to sign and seal a contract of sale without going through the procedures required by section 189 of the *Local Government Act 1989* (which involved consideration of submissions). When later the council did go through those procedures and resolved to sell the land, its actions were challenged as having been a “sham” because, by its actions in supporting the development, it had predetermined the outcome of the section 189 procedure. The Supreme Court upheld the challenge on the basis that the section 189 process had been rendered illusory by reason of prejudgment or bias by the council as decision makers. As a result the council’s purported sale of the land was held to be void and of no legal effect whatsoever.