

COPORATE GOVERNANCE ADVICE RELATING TO THE WEST CUMBRIA MANAGING RADIOACTIVE WASTE SAFELY (MRWS) PARTNERSHIP - SECTION 25 OF THE LOCALISM ACT 2011

Introduction

- 1 Wragge & CO LLP has been requested to update the previous advice given to Copeland Borough Council, as accountable body, and through it, the MRWS partnership, in respect of the risks of apparent predetermination by an individual Councillor giving rise to successful judicial review of any decision by the decision making council.
- 2 The previous advice had regard to the prospective enactment of what is now Section 25 of the Localism Act 2011. The previous advice was to the effect that although the provision may have a bearing on the outcome of any related judicial review claim, it would nevertheless be beneficial to avoid any criticism or potential challenge on the basis of pre-determination.

Position in the light of enactment of Section 25.

- 3 Insofar as relevant, Section 25 provides as follows:
 - (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, in relation to a matter, and
 - (b) the matter was relevant to the decision.

- 4 It is clear that the Section has in mind a claim in judicial review based on an allegation of bias or pre-determination. This is clear from the reference to there being “an issue about the validity of a decision of a relevant authority”. The scope of the Section goes beyond, therefore, whether the individual councillor has breached the Code of Conduct.
- 5 Sub section (2) does not, however, wholly remove the risk of a successful judicial review based on the decision maker or a significant number of those comprising the decision making body having a closed mind. The effect of the Section is simply to preclude such a conclusion being reached solely because of previous actions or statements of the individual councillor. If the impression is given at a meeting at which the substantive decision is taken that an individual councillor has in fact closed his or her mind on the question in hand then, subject to that having an influence on the outcome, it would still be open to an aggrieved individual to argue that the authority has failed to have regard to material considerations.
- 6 As Section 25 only came into effect on 15th January 2012, the provision has not yet, of course, been tested in the courts. Although the draftsman appears to have sought to bring judicial review proceedings within the scope of the provision, it remains to be seen whether decisions where the Section is in issue in the Administrative Court have the effect of barring judicial review claims based on bias or pre-determination.
- 7 In the interim period, it would be sensible for councillors who have participated in the work and recommendations of the Partnership to avoid giving the impression that they have closed their mind to consideration of further material which may become available.
- 8 As made clear in the earlier advice, participation in the work and recommendation of the Partnership and the expression of opinions in that forum, even strongly held ones, does not itself prevent the Councillor concerned participating in the decision of his or her Council. So long as the individual member is open to consideration of all material considerations at the time of deliberation within his own Council then, no valid criticism of pre-determination should arise. That position is reinforced by the coming into force of Section 25 of the 2011 and should assist in the event that any claim in judicial review is made on the basis of bias or predetermination.