

SECTION 7 OF THE COUNCILLORS’ CODE OF CONDUCT: CODE AND GUIDANCE

This document contains Section 7 of the Councillors’ Code of Conduct, issued by the Scottish Ministers, and the accompanying Guidance on the section produced by the Standards Commission. The Councillors’ Code is displayed in purple text, with the Guidance in black and case examples in blue. The Guidance numbering follows that of the Standards Commission’s standalone Guidance document.

While this document covers Section 7 only, councillors should bear in mind the provisions of Section 1 of the Code which sets out their responsibilities and when the Code applies. Councillors should also have regard to Section 2 of the Code, which outlines the nine key principles of public life on which the Code is based.

SECTION 7: TAKING DECISIONS ON QUASI-JUDICIAL OR REGULATORY APPLICATIONS

Introduction

- 7.1** I need to be especially vigilant when I am making a decision on a quasi-judicial or regulatory application. For these applications, I need to ensure there is a proper and fair hearing of the application and I must avoid any impression of bias in the whole decision-making process.
- 7.2** I will deal with many types of quasi-judicial or regulatory applications. Depending on the type of application that is made, there will be often be a formal, statutory decision-making process for its consideration and outcome. There may also be formal legal routes to challenge decisions made on these applications and for this reason I must be aware that my own personal responsibility to ensure a proper and fair hearing has wider consequences for my council's reputation and financial liabilities in the event of any challenge.
- 188** The Key Principles set out at Section 2 of the Code, in particular Integrity, Objectivity, and Openness, are of particular importance where you are taking decisions on quasi-judicial or regulatory matters. The decisions you take will often have a significant impact on the applicant and others. As paragraph 7.2 of the Code sets out, there may be formal legal routes beyond the Council to challenge a decision made on a quasi-judicial or regulatory matter. As many of the decisions will be controversial, they may be subject to intense scrutiny. A failure to observe the terms of the Code, or the perception that you have not done so, could result in a challenge against the Council's decision, with associated cost implications. A successful challenge can have an adverse effect on the Council's reputation, as well as your own. Even if any such challenge is ultimately unsuccessful, it is likely that the Council will still incur costs.
- 7.3** Quasi-judicial or regulatory decisions typically involve:
- a. Planning or other applications in terms of planning legislation;
 - b. Applications for alcohol licensing matters;
 - c. Applications for betting and gaming premises;
 - d. Applications for taxi licences and all other forms of civic licensing;
 - e. Actions where my council is involved in any form of statutory enforcement procedure;
 - f. Any actions where my council is an employer and is involved in any disciplinary issues that I may have a remit to deal with;
 - g. Any procedures for statutory approval or consent involving my Council and where I have a remit to deal with the matter;
 - h. Any appeal procedure where my council has a role and where I am expected to adjudicate on applications, for example an Education Appeals Committee for school placements or school exclusions.

The above list is provided to me only for guidance and is not exhaustive. If I have any doubt as to whether or not my involvement involves a quasi-judicial or regulatory matter I will seek the advice of my council's Monitoring Officer.

Quasi-Judicial and Regulatory Matters

7.4 In dealing with these applications,

I WILL:

- a. throughout my involvement with the entire application process act fairly and be seen to act fairly;
- b. declare interests where required in terms of **Section 5** of this Code and leave the meeting until the matter has been determined;
- c. deal fairly and impartially with all parties involved in the application;
- d. tell those who may be seeking to influence me out with the proper decision-making process that I will not formulate an opinion on any particular application until all information is available to all decision-makers and has been duly considered at the relevant meeting;
- e. take into account professional advice given to me by council employees; and
- f. seek advice from the relevant council employee if I am in doubt as to any material or relevant considerations.

7.5 In dealing with such applications,

I WILL NOT:

- a. pre-judge or demonstrate bias or be seen to pre-judge or demonstrate bias;
- b. indicate or imply support for or opposition to an application nor indicate my voting intention prior to the appropriate meeting where the application will be considered;
- c. in advance of the decision-making meeting, attempt to influence employees to adopt a particular position as that would imply that I am prejudiced in my decision-making;
- d. lobby other councillors who may be dealing with the application;
- e. express any view on the application before the appropriate meeting where the application will be considered. If I do so I will not participate in any aspect of the decision-making nor vote on the application;
- f. formulate my conclusions on an application until all available information is to hand and has been duly considered by me at the meeting where the application will be considered;
- g. express any indicative or provisional views in the course of my involvement in any aspect of the application; or
- h. otherwise act improperly or do anything which could reasonably create a perception that I have acted improperly.

189 The list of quasi-judicial or regulatory decisions at paragraph 7.3 of the Code is illustrative and not exhaustive. You should note that such decisions are not limited to planning or licensing matters and would include, for example:

- decisions made under the Community Empowerment (Scotland) Act 2015 in respect of community asset transfers, or the disposal or change of use of common good property;
- decisions made in respect of the distribution of Crown Estate grants; and
- decisions made in respect of Traffic Regulation Orders.

If you are in any doubt about whether an application or matter is quasi-judicial or regulatory in nature, you should seek advice before taking part in any discussion, decision-making or voting.

190 When making quasi-judicial or regulatory decisions, you must do so objectively and with an open mind. Your decision should be made in accordance with the law, your Council's policies and should be based solely on the merits of the case. You should not represent or make decisions based on any private interest. Questions to ask yourself include:

- are you acting fairly?
- have you taken proper account of the public interest?
- have you taken account of all the material and relevant facts, evidence, opinions and policies?
- are you considering irrelevant and inappropriate matters, such as what may be reported by the press, or what might be popular at the ballot box?
- have you taken account of advice from Council employees who are exercising their statutory duties and functions?
- are you able to give clear and adequate reasons for your decision, if required?
- have you indicated, outwith the committee forum, your support for, or opposition to, the matter on which you are due to make a decision?

191 If you have been appointed to an outside body by the Council you will be entitled to participate in any Council discussion and voting on matters relating to that body. It should be emphasised, however, that you cannot take part in respect of any matter of a quasi-judicial or regulatory nature relating to or potentially affecting that body. Examples of this are where the body in question:

- is applying to the Council for a licence, a consent or an approval; or
- is making an objection or representation or, in some other way, has a material interest concerning such a licence, consent or approval; or
- is the subject of a statutory order of a regulatory nature, made, or proposed to be made, by the Council.

An example of this would be where you have been appointed by your Council to an outside body and that body has submitted an application to the Council for a theatre licence. If you are on the Licensing Committee considering the application you must declare your interest and withdraw from the room while the matter is being considered.

192 If you have an interest (whether financial or non-financial) in terms of Section 5, in relation to a particular application, you must declare that interest, take no part in the decision and withdraw fully from the room. The very limited circumstances where you can remain in the room as a representative in line with your Council's procedures are outlined at paragraphs 7.11 and 7.12 of the Code. When you are outside the room you should not do anything which would raise a suspicion that you were communicating with or in any other way trying to influence colleagues involved in the decision, for example by sending them an email or text. If the meeting is online, it is not sufficient to merely switch off your camera or microphone; you must leave the meeting entirely and re-join when you are advised that the discussions and / or voting on the matter has concluded.

193 Although you are entitled to hold a preliminary view on a matter in advance of a meeting at which a decision will be taken, you must keep an open mind. This means you must be prepared to consider the merits of all views and representations made about the matter under consideration before making your decision. You must not make your mind up about a particular matter before you have had the opportunity to consider all the evidence – making up your mind in this way is known as pre-judging or pre-determination.

- 194** Pre-judging or making a pre-determination may invalidate the Council's decision and leave it open to legal challenge, as well as being a breach of the Code. For example, if you state that *"wind farms are blots on the landscape and I will oppose each and every one that comes before the committee"*, you cannot claim to have retained an open mind on the issue and say that you are prepared to determine each application on its merit. However, saying: *"some people find wind farms ugly and noisy so I will need to be persuaded we should allow more in this area"*, demonstrates you are willing to listen to the merits of an application.
- 195** You may come into contact with quasi-judicial or regulatory matters in your role as a councillor in a number of ways. For example, you may be contacted by a constituent, either in person or in writing, about a particular application. You may sit on the committee deciding the application, or another committee giving a view on it. You may be a member of a committee such as a local review body, with very strict procedural rules on how applications are considered. In all of these contexts you should avoid expressing a view which indicates you have closed your mind on the matter.
- 196** If you take part in a meeting at which views in advance of a committee decision at a later date are being gathered (such as a pre-determination hearing) you can express a preliminary view on the matter in line with any policy your Council may have in place for doing so. However, even in this context, you should avoid comments indicating that nothing will change your mind on how you will vote at any subsequent meeting. If you have made a decision on the same application or a related one you can still take part in the later decision, provided you consider all the relevant material considerations at the later meeting.
- 197** In matters of a quasi-judicial or regulatory nature, it is almost inevitable that you will be lobbied by a number of parties both for and against the issue. You should be mindful of the provisions of Section 6 on lobbying in such situations at all times.

A councillor had, prior to her election to the Council, been a member of an anti-windfarm group. Although she had left the organisation before being elected, she remained as the administrator for its Facebook page. The Panel found that, the councillor's prior membership of the organisation, her continuing role as administrator of the Facebook page, and her previous expression of anti-windfarm sentiments, meant that she should have declared an interest at a planning committee when an application for a windfarm was being considered and withdrawn from the meeting. The councillor was found to have breached the Code.

A councillor, as a member of the Council's licensing committee, made comments to the press which demonstrated that he had pre-judged a House in Multiple Occupation (HMO) licence application before it had been heard by the committee. The councillor had voted against the licence being granted at the licensing committee meeting and in doing so had failed to avoid the appearance of improper conduct. If the councillor had acted in accordance with the Code and not taken part in the discussion and vote, it would have reduced the risk of the Council's decision being legally challenged. When the decision was then subject to legal challenge, the councillor then took part in a vote about whether the Council should defend its decision to refuse the HMO application. This was despite knowing that employees and the licensing committee convener had expressed concerns about his participation in the item at the initial meeting, and despite one of the grounds of appeal being that he, as an individual, had pre-judged the matter. The Panel determined that the councillor should have withdrawn from both meetings and taken no part in the discussion or decision-making on the item at either. His failure to declare an interest and do so amounted to a breach of the Code.

A complaint alleged that a councillor, in his role as a member of a licensing board, stated that he was minded to support an application. This statement was made before the board had heard all submissions, which indicated he had pre-judged the matter. The councillor was also disrespectful towards members of the public who were present as objectors when he questioned them in a confrontational and adversarial manner and was dismissive of their views. Following the licensing board decision, a judicial review seeking of the decision was lodged. The petition, which included an account of the councillor's conduct, was based on the grounds that the objectors were not afforded a fair hearing. The petition was granted by the Court and legal costs awarded against the Council. It was found the councillor had breached the Code.

A complaint alleged that a councillor had sent emails from his Council email account to certain members of an area committee, making representations in support of a planning application made by a company of which he was a director. It was found that he had made the representations outwith the committee forum and not in accordance with the relevant Council procedures. The councillor was found to have breached the Code.

Policy and Strategy

- 7.6** My role in policy and strategic issues may have a very wide relevance to my council area. For example, I have a key role in establishing policies for the benefit of my council's area and I am fully entitled to express my genuinely held views or to advocate proposals for the adoption of key guidance. It is entirely appropriate that I can express my views on matters of such general importance to my council area.
- 7.7** When I am being asked to develop a policy and set a strategy that forms the framework under which individual applications may subsequently be decided, I understand that I can discuss or debate these items of policy or strategy. However, I will only take into account material considerations affecting the policy or strategic issue and will have regard to the requirement for the adoption of the policy or strategy to be based on facts and evidence.
- 7.8** For policy and strategic issues under which individual applications may subsequently be decided,
- I WILL:**
- a. be able to express my views;
 - b. be able to advocate proposals that I consider to be of benefit to my council area;
 - c. have regard to the evidence-base behind the formulation of the policy or strategy in question.
- I WILL NOT:**
- d. do anything or be motivated to do anything that is connected or linked in any way with my personal involvement in a policy or strategic issue;
 - e. express any view that suggests I have a closed mind on the policy or strategic issue regardless of any material considerations affecting that issue.
- 198** Many quasi-judicial or regulatory decisions are taken against the background of a policy or strategy which has previously been agreed by the Council or one of its committees. Such policy or strategy (for example, a local development plan) could have been set as a result of a decision being made on an application relating to one you are now considering. As such policies are always under review, you should be mindful that they may be changing while applications are being decided. In such contexts, you can express views on policy and strategic issues while still being able to determine applications relating to them.

- 199** When making statements about emerging policy, you should nevertheless be mindful that the Council must be able to demonstrate that all relevant and material evidence underpinning such matters has been considered. As such, you should make it clear that you will not reach a final decision until you are in possession of and have considered all relevant and material information.
- 200** For example, you may think that a particular site being proposed for housing development in the draft local development plan is unsuitable. It would be perfectly legitimate for you to say something like, *“I’m not convinced that X is the best site for housing development”*. However, you should avoid saying *“nothing would convince me that the site in question should be developed for housing”*, as doing so could indicate that you had entirely closed your mind on the matter before being in possession of and considering all relevant and material information.
- 201** You can adopt an advocacy role by, for example, saying you would welcome planning applications for the redevelopment of an area, or would like to preserve greenbelt land or promote industry. As a member of a Licensing Committee or Board you may wish to express a view and seek to influence the Council’s formation of a policy to address local concerns, such as stating that you consider there is an overprovision for licensed premises in a particular area or an overprovision of Houses of Multiple Occupancy. However, you cannot then comment on a specific application, once lodged, in advance of the meeting at which it will be determined.
- 202** You should familiarise yourself with the Scottish Government’s Guidance on the Role of Councillors in Pre-Application Procedures which can be found at: <http://www.gov.scot/Topics/Built-Environment/planning/Roles/Planning-Authorities/Documents>

Representation

- 7.9** If I intend to be involved in the decision-making for any quasi-judicial or regulatory application, **I WILL NOT:**
- a. organise support for or opposition to the application in any way;
 - b. represent or appear to represent individuals or groups who are seeking to make representations for or against an application; or
 - c. compromise myself or my Council by creating a perception of a conflict of interest.
- 7.10** In circumstances where I am a member of a Committee as a decision-maker but have been involved in organising support for or opposition to an application, **I WILL:**
- a. declare an interest in the matter, and
 - b. withdraw from the meeting without participating in the consideration of the matter.
- 203** Paragraph 7.9 of the Code makes it clear that, if you wish to remain part of the decision-making process, you cannot act as an advocate either for or against an application. If you have done so, you are obliged in terms of paragraph 7.10 to declare an interest and leave the meeting room – this includes leaving the media gallery, the public gallery or any other space within the meeting room.
- 204** In some councils there are procedures under which supporters of, or objectors to, applications can make verbal representations at a meeting. If you have been involved with any such individual or group, you should consider very carefully whether your participation in such procedures would be helpful. It may be that another representative from such a group could make the representations instead.

7.11 In circumstances where I am a member of a Committee as a decision-maker but wish to represent individuals or groups who are seeking to make representations for or against an application,

I WILL:

- a. follow procedures agreed by my council which afford equal opportunity to any parties wishing to make representations to do so;
- b. declare an interest in the matter; and
- c. only remain in the meeting, while that item is being discussed, for the purposes of acting as the representative of the individual or group throughout the duration of their participation.

I WILL NOT:

- d. participate or attempt to participate as a decision-maker in that application;
- e. attempt to influence employees to adopt any particular position relative to the matter; or
- f. lobby other councillors who may be involved in the decision-making process.

205 If you intend to make representations before a committee you are a member of, for example, to support your constituents' views, you should advise the Chair and committee clerks at the earliest opportunity. You should ensure your declaration of interest is recorded in the minutes of the meeting. When making such representations, you should do so from the same place as any member of the public or applicant would do, and not your usual committee seat. You should only participate to the extent that your Council's procedures and standing orders would allow any other individual to do so.

206 If you have made representations, you must not participate as a decision-maker in the application, nor attempt to influence employees or lobby other councillors involved in the application.

7.12 In circumstances where I am not a member of any Committee which is making a decision on an application, but wish to represent individuals or groups who are seeking to make representations for or against it,

I WILL:

- a. follow procedures agreed by my council which afford equal opportunity to any parties wishing to make representations to do so; and
- b. only remain in the meeting for that item for the purposes of acting as the representative of the individual or group throughout the duration of their participation.

I WILL NOT:

- c. participate or attempt to participate as a decision-maker in that application;
- d. attempt to influence employees to adopt any particular position relative to the matter; or
- e. lobby other councillors who may be involved in the decision-making process.

207 If you intend to make representations before a committee you are not a member of, for example, to support your constituents' views, you should only participate to the extent that your Council's procedures and standing orders would allow any other individual to do so.

- 208** Having made any such representations, you should then follow your Council's policies and procedures for parties appearing before committees, while the application is being discussed and determined. For example, if the Council's policy requires the party who has made the representation to leave the room, you should do so. If it requires the party to retire to the public gallery, you should do the same. If you retire to the public gallery, you should not do anything from there that could give rise to suspicion that you are trying to influence the decision.

Site Visits

- 7.13** In respect of any site visits that have been decided upon or agreed by the Committee as a stage in the consideration of the application,

I WILL:

- a. follow my council's procedures for such visits as set out by my council and that with regard to any legislative requirements or notes of guidance or practice;
- b. remember that such site visits are part of the decision-making process and as such are formal in nature and may have procedures as set out by my council.

- 209** The Code recognises that individual Councils will have their own procedures for site visits and does not attempt to be prescriptive about what these procedures should include. Some Councils will insist that you attend site visits if you are taking part in the final decision. This is particularly the case in relation to local review bodies carrying out site inspections under the planning legislation. As site visits can form part of the committee process, a degree of formality should apply, and you should behave accordingly. You must follow your Council's own procedures in making site visits as part of the committee process, and must not give any impression during a visit that you have made your decision prior to the committee itself.

Enforcement

- 7.14** In my role, I may become aware whether by complaint or by direct knowledge of the need for council intervention by way of appropriate enforcement action. In this event, I will refer the matter for investigation to the appropriate service of my council.

I WILL ALSO:

- a. advise all subsequent enquirers to deal directly with the relevant employee of the Council department;
- b. be able to request factual information about the progress of the matter from the relevant employee.

I WILL NOT:

- c. lobby for a particular outcome;
- d. get involved in the operational detail of any enforcement actions which are subsequently taken by my council.

- 210** If you are advised or become aware that the Council may need to take enforcement action in respect of any quasi-judicial or regulatory matter, you cannot get involved and cannot organise support for opposition to such action. You can only refer the matter to the appropriate Council team, or advise anyone making an enquiry about how to do so.

- 211** Similarly, you cannot lobby other councillors (whether they are on the relevant committee or not), or put pressure on planning officers to either take, or not take, investigative or enforcement action.

- 212** Most enforcement matters are delegated to Council employees. While you can ask for updates on how a particular enforcement is progressing, you cannot interfere in any action that is taken by your Council. More information on how to distinguish between strategic and operational matters can be found in the Standards Commission's Advice Note for Councillors on Distinguishing Between their Strategic Role and any Operational Work, which can be found at: <https://www.standardscommissionscotland.org.uk/education-and-resources/professional-briefings>.
- 213** You should also bear in mind that the decision on one application may not be the end of the matter and that other, related applications may be lodged in the future. You should be careful of the perception that any close interest you show in enforcement may indicate that you are supporting or are opposed to any related application.