

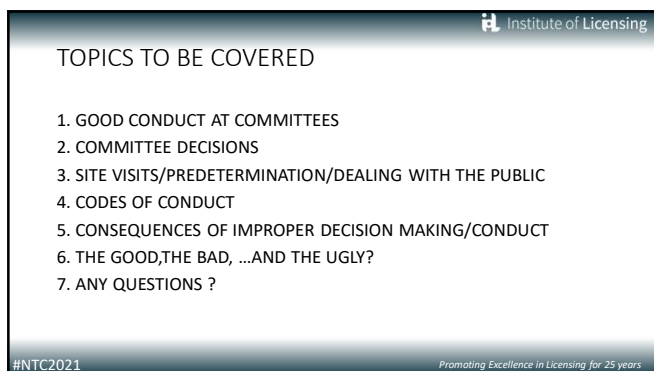


MEMBERS CONDUCT – the good the bad and the ugly?

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Promoting Excellence in Licensing for 25 Years

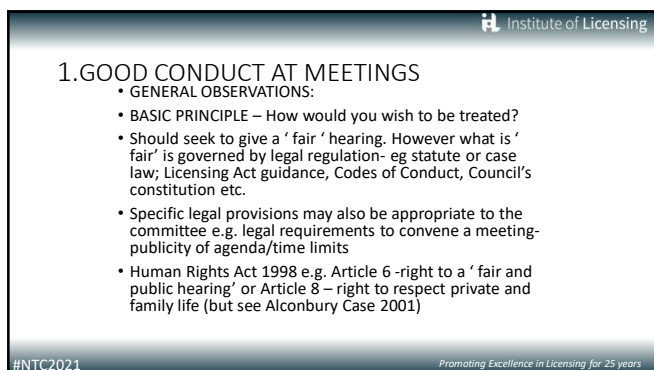
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#NTC2021



TOPICS TO BE COVERED

1. GOOD CONDUCT AT COMMITTEES
2. COMMITTEE DECISIONS
3. SITE VISITS/PREDETERMINATION/DEALING WITH THE PUBLIC
4. CODES OF CONDUCT
5. CONSEQUENCES OF IMPROPER DECISION MAKING/CONDUCT
6. THE GOOD, THE BAD, ...AND THE UGLY?
7. ANY QUESTIONS ?

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1. GOOD CONDUCT AT MEETINGS

- GENERAL OBSERVATIONS:
 - BASIC PRINCIPLE – How would you wish to be treated?
 - Should seek to give a 'fair' hearing. However what is 'fair' is governed by legal regulation- eg statute or case law; Licensing Act guidance, Codes of Conduct, Council's constitution etc.
 - Specific legal provisions may also be appropriate to the committee e.g. legal requirements to convene a meeting- publicity of agenda/time limits
 - Human Rights Act 1998 e.g. Article 6 -right to a 'fair and public hearing' or Article 8 – right to respect private and family life (but see Alconbury Case 2001)

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- The Rules of Natural Justice – applies to 'quasi judicial' decisions - however whilst Licensing Committees have now been classified as 'administrative', it is good practice to follow the Rules e.g. no man may be a judge in his own cause, let both sides be heard
- The Authority's Constitution – governs procedural issues e.g. who can speak, and when
- Other provisions eg the members Code of Conduct, Committee protocols etc.
- NOTE; different committees have different rules and procedures e.g. Licensing Act Committee, general Licensing Committee (Taxi's etc.), Planning
- Members should be aware of this, though general good practice should apply to all committees

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• KEY POINTS/CHECKLIST


- Check that you have received all papers in advance of meeting
- Read all papers BEFOREHAND – don't leave it to the meeting
- Have you got a Personal or Prejudicial, interest, and/or an interest under your code? Speak to Monitoring officer as soon as possible
- If anything is unclear – raise before, rather than at, the meeting
- Pre Committee meetings
- Be careful as to what you say or do before a meeting (see later regarding predetermination etc.). Is the item to be ' in camera ' ?
- Exclusion of the Public – generally-are the grounds under Schedule 12A of the Local Government Act 1972 made out? ALSO – is it in the Public Interest to exclude the press and public- 'the public interest in maintaining the exemption outweighs the public interest in disclosing the information'? Need to resolve the above. If Licensing Act hearings see Reg14- 'hearing shall take place in public'... may exclude '...where it considers public interest in so doing outweighs the public interest in the hearing taking place in public

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- At the meeting – follow procedure rules, or seek to get them waived or suspended if appropriate
- Consider , and be seen to consider, what the officer presenting the report says, and the report itself.
- Can question the applicant, officers etc, but through the chair in a controlled, pertinent way. Questions should be limited and precise, preferably one at a time, and designed to elicit information or clarify issues.
- Treat the applicant , officers, and other members with respect, but there can be ' robust ' political debate see R (on the application of Calver) v The Adjudication Panel for Wales 2012

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- Calver, R (on the application of) v the Adjudication Panel for Wales [2012]
- Regarding Article 10 of the ECHR the judge Beatson J said 'freedom of expression includes the right to say things which 'right thinking people' consider dangerous or irresponsible or which shock or disturb', and 'freedom only to speak inoffensively is not worth having'
- Political speech is afforded 'enhanced protection' and that politicians acting in their public capacity should possess ' thicker skins and greater tolerance'
- Accordingly, Mr Calver was not in breach

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- Speak in accordance with the rules of debate, within the allocated time
- Avoid coming in and out of meeting when an item is being deliberated
- Avoid improper or emotive language, and unconscious 'signals' e.g. egregious body language
- Make sure resolution to be voted on is clear
- Is the decision a decision that a reasonable decision maker could make? i.e. 'Wednesbury Reasonable'- could you explain or defend it in court?
- Clearly vote (possible named votes etc.)
- Chair has casting vote


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2.COMMITTEE DECISIONS


- Specific rules and provisions apply to different committees e.g. Licensing Act committee – needs to have a statement of Licensing Policy, decisions should be made in accordance with it etc.
- 1. Check what your constitution/protocols state regarding that committee
- 2. Committees may also be 'quasi judicial' – tighter rules apply
- 3. Ensure that you have received appropriate training- broad legal framework, good decision making, probity etc.
- 4. In general good decision making principles will apply to all committees

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- Decisions should be debated, though each member need not necessarily speak
- Members should agree the decision, and reasons for it. Officer guidance should be sought in most cases. The reasons should be clear and concise, and relevant to, and accurately reflect the decision.
- If you have a policy, you should follow it, unless there are good reasons to depart from it. You cannot fetter your discretion. Reasons for departure should be stated.
- Be aware of specific principles or constraints that apply to that committee e.g. Licensing Act decisions should be given 'forthwith'

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- Be seen to consider all relevant matters, do not consider irrelevant matters, and generally base the decision on the committees policy. These should be identified in the report. If not, officers should be asked to advise on such issues.
- Members do not have to follow recommendations, but should carefully consider them.
- A committee should have good, cogent, reasons for departing from adopted policies, or government policy/guidance. These reasons should be clearly stated.

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- Each case should be determined on its merits, though there should also be consistency in approach see also relevant guidance e.g. under Section 182 Licensing Act 2003
- Any conditions imposed should be;
 - Necessary/Appropriate
 - Relevant, proportionate and justifiable
 - Enforceable
 - Precise
 - Reasonable
 - Tailored to individual premises
 - Unambiguous
 - Not duplicate other statutory provisions


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3.SITE VISITS/PREDETERMINATION/ DEALING WITH THE PUBLIC


- SITE VISITS
- What does the committee protocol say?
- Are they compulsory?
- Avoid speaking to the public/ other parties
- Members should be accompanied by officers
- Should always avoid 'private' or 'off the record' conversations

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- PREDETERMINATION/BIAS
- Members should always avoid the perception of bias. This can include presumed bias e.g. a direct financial interest, actual bias see R v Inner London Coroner ex parte Dellaglio- a coroner described a witness as 'unhinged' or apparent bias- see Porter v McGill 2001
- Predetermination or Predisposition?
- A member is NOT precluded from having a view on a matter- may be reason elected. However, if your actions or views show a 'closed mind' then this may invalidate the decision, and/or amount to a breach of your Code (see Localism Act 2011)

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- Section 25 Localism Act 2011
- 'a decision maker will not be considered to have had a closed mind , or to have given the appearance of a closed mind, JUST BECAUSE the decision maker had previously done anything that indicated what view the decision maker took or might take in relation to a matter relevant to the decision'
- Always make it clear that the member will make a final decision after hearing all the facts at the committee

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- Predetermination in any event does not apply to policy decisions, only individual/quasi judicial determinations
- Neither does it apply if a member has reached a view by virtue of fulfilling another function e.g. by sitting on another committee such as Licensing, or Planning though care, and advice should be taken
- However members should never be seen to 'fetter' their discretion, nor 'shut their ears' to an application – see R v Port of London Authority ex parte Kynoch 1919

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- DEALING WITH THE PUBLIC
- Generally not a problem seeking constituents views
- However, need to be careful, not to compromise position e.g. make promises, or improper statements
- Should seek to have an officer or colleague present
- What does the relevant protocol state?
- Always make it clear that the member will keep an open mind


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4.CODES OF CONDUCT

- All Authorities should have a members Code of Conduct which seeks to regulate members behaviour.
- In England, Codes are governed by the Localism Act 2011, and does not impose specific enforceable sanctions for breach of the Code. However it is likely that a more formal Code will be introduced in the near future. In Wales the Code is governed by the Local Government Act 2000, and breach of the Code does have enforceable sanctions.
- Most Codes will contain the following broad provisions;
- That they embody the 'Nolan Principles' of Public service
- That members – show respect and consideration for others (includes other members, officers and the public – see Calver case) and not compromise the impartiality of officers
- - do not disclose confidential information/prevent access to information
- - do not conduct themselves in a manner that could reasonably be regarded as bringing the authority into disrepute- improper conduct of any kind e.g. hospitality
- - do not use or attempt to use their position improperly to confer on or secure for themselves or another an advantage or avoid a disadvantage- improper grant or refusal of permission


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CODES OF CONDUCT


- - reach decisions on the basis of the merits of the circumstances involved and in the public interest HAVING REGARD TO any advice provided by the authority's officers
- – avoid accepting gifts or hospitality from anyone... Which might place them under an improper obligation

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- The Codes expect members to consider whether they have a Personal or Prejudicial interest, and deal with each appropriately
- If Personal – declare and stay
- If Prejudicial – declare and leave- see Adjudication Panel for Wales v Lewis 2015
- Prejudicial - might the decision be reasonably regarded as affecting a members well being or financial position OR any person with whom they have a close personal association (in Wales)
- TEST – Prejudicial Interest – ‘if a member of the public ... Would reasonably regard it as so significant that it is likely to prejudice your judgement of the public interest’

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- In England, if a member has a Pecuniary Interest in a matter, they should declare and register the interest. Failure to do so is a criminal offence punishable by a fine, and/or disqualification as a councillor. To date there has only been one conviction for this – Flowers 2015. It is likely that these provisions will be repealed

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- For England, The Committee on Standards in Public Life report in Jan.2019 recommends;
- 1.A new model code of conduct
- 2.A presumption that councillors behaviour is in an official capacity
- 3.Council's will have a power to suspend members up to 6 months(with the agreement of an independent person)
- 4. Right of appeal to the Ombudsman
- 5. Abolish the criminal offence regarding Pecuniary Interests

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- In Wales - new Ombudsman's powers include (Public Service Ombudsman(Wales) Act 2019);
- Power to investigate matters on own initiative
- Complaints need no longer be in writing
- Wider group of public bodies subject to jurisdiction eg health service providers, social landlords
- Obstruction and contempt of the ombudsman – can be referred to the High Court – punishable as contempt of court – imprisonment and fine
- Ombudsman and staff ' absolute privilege' from defamation claims


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5.CONSEQUENCES OF IMPROPER DECISION MAKING/CONDUCT


- 1. APPEAL
- An unsuccessful applicant for a Licence or planning permission can appeal to the appropriate body eg the Magistrates Court or an Inspector
- An Appeal may hold matters up, be costly, and result in negative publicity

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- Furthermore, if a Local Authority loses an Appeal, it may be liable for the successful parties costs (but see Bradford v Booth 2000)
- 'a Local Authority ought not to pay costs unless it has acted unreasonably, improperly, or dishonestly'

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- 2. CRIMINAL LIABILITY
- In England – failure to declare Disclosable Pecuniary Interest – a criminal offence under the Localism Act 2011. However it is likely that this provision will be repealed in the near future. In Wales – breach of the Code is not an offence per se
- Bribery Act 2010 - (England and Wales) - An offence to 'offer, give solicitor or accept money or other advantages in order to induce or reward the improper performance of public or other functions. Max penalty; 10 years imprisonment
- Misconduct in Public Office. Max – life imprisonment (see later)
- Miscellaneous – General criminal law e.g. assault, voting on council tax if in arrears etc.

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- 3. JUDICIAL REVIEW
- Generally a challenge by a person aggrieved by a decision
- Basis – that the decision was wrong in law, or failed to follow correct procedure, or was one that no reasonable decision maker could have come to etc.
- Numerous technical issues e.g. need leave/ standing / time limits etc.
- Generally Judicial Review not a significant issue, as leave will not be granted if there is an alternative remedy eg appeal to the magistrates court
- COSTS

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- 4. MALADMINISTRATION
- The Local Government Ombudsman can make a finding of maladministration regarding a decision, or the way in which a matter has been handled
- Examples – delay, failure to follow procedure, failure to act, or provide information see *Breckman and Roberts v Carmarthenshire Council* 2012
- This can result in bad publicity and an award of compensation
- Ombudsman will not usually act if there is an alternative remedy.

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- 5. BREACH OF MEMBERS CODE
- In England – no formal Sanction at present. Likely that a new formal code will be introduced in the near future.
- In Wales – A member can be disqualified as a Councillor for up to 5 years, or suspended up to 2 years, or censured
- 6. MISCONDUCT IN PUBLIC OFFICE
- Common Law offence see the Attorney General's Reference 2003 (No 3)
- Officers or members who 'neglects to perform his duty and/or wilfully misconducts himself to such a degree as to amount to an abuse of the public's trust in the office holder without reasonable excuse or justification'
- Criminal offence – max ;Life Imprisonment see *R v O'Sullivan and others* 2015
- Also a civil wrong

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- 7. Defamation
- 'an untrue statement, which is published, which damages a person's reputation, or makes them subject to hatred or ridicule, or injures them in the course of their profession or trade'
- Publishing – can include Twitter comments – see *Talbot v Elsbury* 2011
- Note Article 10 ECHR and the *Calver* case (see above)
- Local Authorities (members and Officers) order 2004 - Indemnities

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- THE GOOD
- Read all papers beforehand
- No improper pre committee comments
- Follows procedure rules / rules of debate
- Listens, and is seen to listen to all sides
- No improper body language
- Timely, clear, pertinent, helpful questions
- Clear advocacy of position in debate
- Treats all parties courteously, and with respect
- Clear vote
- Outcome – a ‘watertight’ decision

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- THE BAD
- Only reads papers at meeting
- Speaks out inappropriately before the meeting
- Displays lack of attention at meeting
- Shows lack of respect or consideration for others
- Fails to follow procedure, intervenes inappropriately
- Irrelevant or no contribution to debate
- Votes the wrong way!
- Reaches a decision contrary to policy, against recommendation (without good reason) or contrary to the legal framework based on illogical or irrelevant reasons
- Publishes confidential matters

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- THE UGLY
- Cllr N – North East Derbyshire ‘do you know who I am? I am your boss. I am in charge of this firm’
- Cllr C – Tewksbury. Pushed a councillor over in the chamber, and said – ‘if you report me, I’ll chop your f..... hands off’
- Cllr J Kingston upon Hull told Council Solicitor ‘if you seek repossession I will have your guts for garters’
- Cllr P – East Riding of Yorkshire – facebook comment ‘I will be donating the steam off my p... to a deceased MP

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- Cllr B – Wigan – used Council issued mobile phone to call premium rate sex chat lines at a cost to the council of £2000 plus, and also texted sexist messages to a female officer; Breach of IT policy, and brought office into disrepute
- Cllr B – Swansea – had over 70,000 pornographic images on council issued laptop ; Adjudication Panel for Wales; disrepute and breach of IT policy – 3 years, 6 month disqualification.
- Cllr M – Monmouthshire – described a candidate at interview ‘he was a breath of fresh air, and he is black’ and ‘where did you get that tan?’ Breach; Equalities training given
- Cllr P – Swansea – described opposition councillors as ‘a devil’s cabal of crypto fascists and political bag carriers’ No breach – legitimate political comment

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- Councillor H – Flintshire 2017- described a council employee as follows ‘ he is arrogant, lazy, mentally challenged and has been useless for years. Why do you not call him to account. He is not worth his salary’ Breach – disqualified 14 months
- Councillor W -Avon FRS 2018 –Ruffled papers, and was ‘disrespectful’ during a minutes silence before a meeting. No breach
- Councillor M – Neath Town Council- 2019 – said a constituent who had ben stabbed to death ‘ deserved to die’. Breach 4 months suspension
- Councillor C – Merthyr 2015 – Police found him found ‘ covered in lipstick’ at a brothel in Merthyr. No breach – did not bring the council into disrepute

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- Vexatious complaints /difficult cases;
- ‘A councillor left a one star rating on a local business without an explanation’ – no action- vexatious
- ‘a councillor unfriended me on Facebook, so I had to set up an account in my cat’s name’- no action – vexatious
- Councillor D – Monmouthshire; email to chief executive by councillor, contained comments which failed to show respect for the LGBT community. Issues regarding Articles 8 privacy and family life, Article 9 freedom of thought belief and religion, and Article 10 Freedom of expression. Some of the comments e.g. ‘ridiculous multi coloured rag outside county hall’ were deemed within the enhanced protection for political expression, though others, e.g. ‘homosexuality is an immoral perversion to be condemned, not promoted’, were not, and breached the Code; Suspension for 2 months.

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- Cllr O – Merthyr 2020 – failed to declare that he lived next door to a proposed children's home, also failed to show the chief executive 'respect and consideration'. Breach 7 month suspension
- Cllr J – Newport 2021 – 'improperly and threateningly' used position on Health Board as a Council representative to seek to assist a constituent. breach - 3 month suspension
- Cllr P - Caerphilly – represented Council on a regional partnership, and in so doing obtained 'inside' information regarding a Company that was receiving financial assistance, and then bought shares in the Company. APW found breach – disrepute/ improperly gaining an advantage – 5 month suspension

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- ANY QUESTIONS?
- THANK YOU

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