**STANDARDS COMMITTEE, MID SUSSEX DC**

**Paper for meeting on 1 April 2009**

**Chairman's Report on South Area Independent Members' Forum, 18 March 2009**

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1. This meeting of the Independent Members' Area Forum was hosted by Woking BC, and as on previous occasions there was a good attendance (just under 40). Although the initial agenda had seemed very thin, the discussions threw up a number of points which are likely to be of interest to the Committee.

**Presentation by Guildford**

2. The Monitoring Officer of Guildford BC, Richard Lingard, described two cases which had gone to determination before his committee, in order to share some general lessons which they had drawn from the experience. The first case had revolved around a letter sent by a parish council chairman to the head of development control at the BC. This purported to relate to a current planning application, and as such was duly published on the borough council's website. In fact it was more concerned with attacking the integrity and past activities of a member of the public who was involved with the planning application. In the course of the investigation the parish chaiman claimed never to have been offered standards training in relation to planning matters; but exhaustive checking established that he had. The two lessons drawn from this case were:

a) that a full record of training, both offered and actually provided, ought to be maintained as a matter of course;

b) that documents submitted in relation to planning applications should perhaps be scrutinised for relevance before being made available to the general public.

3. The second case was highly complicated, and is not yet entirely resolved; but in essence it concerned a letter from the chairman of the planning committee to a local paper which, it was claimed, misrepresented the powers and past decisions of that committee. The assessment sub-committee of the Standards Committee had opted for "alternative action", requiring the planning committee chairman to make a public acknowledgement that his letter had at least been ambiguous. This was done, but the complainee refused to make this acknowledgement in the terms demanded by the complainant because, in accordance with Standards Board guidance, he had not seen the full details of the complaint. The lesson drawn by the Guildford Monitoring Officer was that the guidance is wrong and that the subject Member should see the full details of any complaint as soon as it is received . I was in a minority in the ensuing discussion, the general tenor of which was to support the speaker's view and to stress the dangers of opting for "alternative action" rather than a full investigation.

**Miscellaneous Points**

4. The following miscellaneous points of general interest arose in the course of discussion on other agenda items:

a) The chairman of Test Valley DC, which has a large number of parishes, said that she and her fellow independents tried to attend parish meetings and so become known to parish councillors. This would be quite a demanding task to take on, but it is perhaps something that deserves discussion. She also stressed the importance of getting new parish councillors trained as soon as possible, while they are still impressionable.

b) The revised Code of Conduct is now expected to appear in June/July. This will take account of the court judgement in the Ken Livingston case about the scope of private life and activity. It remains to be seen whether the changes will be sufficient to require a further round of training, which would be tiresome.

c) A show of hands revealed that I was very much in a minority in not being given the opportunity to present Standards Committee reports to Council in person. This is perhaps being dealt with in in a current review of Mid Sussex's constitution.

**Forthcoming meetings**

5. The Forum will next meet on Monday 19 October at Arun DC, Littlehampton. Horsham DC wiil host the meeting in the first half of 2010. The time is perhaps approaching when Mid Sussex may be expected to come forward with an offer to host.

**ROGER SANDS**

20 MARCH 2009

**STANDARDS COMMITTEE – 1st APRIL 2009**

**THE CODE OF CONDUCT, PREDETERMINATION, BIAS, THE OMBUDSMAN, THE STANDARDS BOARD AND THE HIGH COURT**


| | |
|---|---|
| REPORT OF: | Tom Clark, Monitoring Officer<br>Email: tomc@midsussex.gov.uk Tel: 01444 477459 |
| Wards Affected: | All |
| Key Decision | No |


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**Purpose Of Report**

1. For Members to consider the inter-relationship between the Code of Conduct and the rules on bias and pre-determination with particular reference to Planning Committees.

**Summary**


2. The Members Code of Conduct does not seek to deal with the rules of bias and pre-determination that apply to quasi-judicial committees such as planning and licensing.

**Predetermination** is when a decision maker by virtue of his or hers words, actions or associations has prejudged an issue. An obvious example is when a member says to the press "I don't care what the officer report says or the views of my fellow councillors, I shall be voting against/for this application."
**Bias** is established when a fair- minded and informed observer, having considered all the facts would conclude that there was a real possibility that the member was biased. It is an objective test and it does not have to be shown that the member was in fact biased. The test for whether a personal interest is a prejudicial interest is similarly an objective test.


**Recommendations**

**3. To note the facts of the case and the result of the Ombudsman investigation, the Standards Board decision and the consideration of both by the High Court and to consider whether any further advice/training should be given to members serving on such committees**.

**Background**

4. A Councillor at Harrogate Borough Council was in receipt of an enforcement notice for the removal of a caravan in a field in an Area of Outstanding Natural Beauty. The Councillor then applied to build a house in place of the caravan and this was

considered by an Area Planning Committee. Against officer advice, the Committee agreed on the casting vote of the Chairman to grant planning permission. Given this decision was against officer advice the matter was deferred and brought back to the following Area Planning Committee where the decision was reviewed and once again Members approved the planning permission on the casting vote of the Chairman.

4.1 The Chairman and the applicant Councillor knew each other and were members of the same party and travelled to the Council meetings in the same car.

4.2 It was the view of the Local Government Ombudsman that this relationship would suggest to an ordinary member of public that there was bias in the decision of the Chairman both to vote against officer advice and then use the casting vote to approve the application which was against established planning policy.

4.3 On 3rd January 2007 the Cabinet of Harrogate Borough Council decided to report the matter to the Standards Board for England and also refer it by way of judicial review to the High Court for the planning permission to be quashed.

4.4 At the Standards Board the matter was considered under the pre May 2007 Code of Conduct which provided that a Member should declare a personal interest if they were a friend of someone affected by an application. The Ethical Standards Officer at the Standards Board concluded that the Councillors were not friends of each other within the definition of the Code of Conduct and therefore the Chairman of the Committee had no personal interest to declare. Without a personal interest he could not have a prejudicial interest. Since May 2007 the word 'friend' has been replaced by 'someone with whom you have a close association'. It may well be under the new test the Councillor would be regarded as having a 'close association'. The Ethical Standards Officer made clear the Code of Conduct did not cover matters of bias and pre-determination.

4.5 The High Court Judge concluded that any fair minded and informed observer would conclude that there was indeed real possibility of bias in the decision to grant planning permission.

4.6 Members are referred to Appendix 1 which is the Ombudsman Report in full. Appendix 2 which is the findings of the Standards Board for England and Appendix 3 which is the judgement of the High Court before Mr Justice Sullivan.

4.7 Members are asked to consider what advice would be useful to Members (particularly those serving on Planning and Licensing Committees) in relation to the rules on bias and pre-determination and where applications are made by fellow Councillors.

**Financial Implications**

5. The case will have been a substantial cost to Harrogate Borough Council in terms of the financial outlay for the three sets of proceedings and the reputation of the Council as a Planning Authority.

APPENDIX ONE

Local Government
OMBUDSMAN

# Report

## on investigation into complaint no 05/C/15424 against Harrogate Borough Council

**14 December 2006**

**Beverley House, 17 Shipton Road, York YO30 5FZ**

# Investigation into complaint no 05/C/15424 against Harrogate Borough Council

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## Key to names used

| | |
|---|---|
| Councillor Simms | Chairman of the Area Planning Committee |
| Councillor Ellington | Vice-Chairman of the Area Planning Committee |
| Councillor Elwyn Hinchcliffe | Member of the Area Planning Committee |
| Councillor D | Member of the Area Planning Committee |
| Councillor E | Member of the Area Planning Committee |
| Councillor F | Member of the Area Planning Committee |
| Councillor G | Member of the Area Planning Committee |
| Councillor H | Member of the Area Planning Committee |
| Councillor Atkinson | Applicant for Planning Permission and Member of the Area Planning Committee |

## Report Summary

### Subject

Planning ...enforcement...area of outstanding natural beauty...Member interest

### Finding

Maladministration leading to injustice

### Recommended remedy

The Council should consider what action it should take to cancel the planning permission which was improperly obtained. In the meantime, any consideration of reserved matters under the current planning permission should be dealt with in the light of this report.

The Council should review the training it currently offers to Members to clarify any areas of doubt surrounding personal friendships.

The Council should consider whether it is appropriate to take enforcement action to remove the kennels, sheds and other structures surrounding the caravan; and investigate and pursue any council tax which might be due and unpaid in respect of the caravan.

## Introduction

1. Mr and Mrs Miles complain about the Council's failure to serve an enforcement notice on a Councillor for the removal of a caravan from a field in an area of outstanding natural beauty; and about its subsequent decision to grant the Councillor outline planning permission to build a house in the caravan's place. The outline planning permission was granted after the then Chairman of the Area Planning Committee, allegedly a friend of the applicant Councillor, used his casting vote in favour of the application. Mr and Mrs Miles also complain that the applicant Councillor suppressed local objections through the Parish Council and that no site notices advertised the proposed development to the public. A house, they say, will spoil a spectacular view from their village over the Vale of York.

2. The law generally requires me to report without identifying or betraying the identity of the people involved unless I consider the public interest better served by the disclosure of this information and no private interest inappropriately prejudiced by it. For this reason the name given to the complainants in this report is not their real name, some Councillors and officers are not identified but the name of the Councillor who applied for the planning permission and of the three Councillors who were instrumental in its approval are the real names of those persons involved[1].

3. An officer of the Commission has talked to Mr and Mrs Miles, examined the Council's files and has interviewed Members and officers of the Council. She has also taken advice from an officer of the Department of Environment Food and Rural Affairs.

4. An opportunity has been given for the complainant and the Council to comment on a draft of this report prior to the addition of the conclusion.

## Legal and Administrative Background

5. Local government must operate within an ethical framework laid down by law[2]. The government has issued a Model Code of Conduct for councillors and all councils must adopt a local Code based upon that Model. The Code of Conduct adopted by Harrogate Borough Council says that a Councillor must not use his position improperly to confer on or secure for himself or anyone else any advantage or disadvantage.

6. The Code also requires Councillors who belong to a political group to declare a personal interest in any planning application by a member of the same political

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1 Local Government Act 1974, section 30(3) as amended by the Local Government Act 2000, schedule 5, section 15.

2 Local Government Act 2000, Part 111

group[3]. Once declared, the Councillors can take part in the meeting and vote but they must take no part in the proceedings whatsoever if their interest is also prejudicial.

7. A prejudicial interest is one which a member of the public with knowledge of the relevant facts would reasonably regard as so significant that it is likely to prejudice the Councillor's judgement of the public interest. The test, the courts have held, is not just actual bias but the appearance of bias; whether a fair minded and informed observer, with knowledge of the facts, would conclude that there was a real possibility of bias[4].

8. In addition to the Code of Conduct for Members[5], Harrogate Borough Council has adopted a Planning Code of Good Practice. This Code says Councillors must approach their work openly, transparently and without prejudice, and they must avoid any possibility of being influenced by their own personal interests. Councillors who have an association with an applicant should not be involved in decision-making. Clear, accurate reasons should be given for all decisions, especially those taken contrary to policy and contrary to an officer's recommendation.

9. In addition to being considered without predetermination, bias or the appearance of bias, planning decisions must be made in accordance with the 'development plan' unless material considerations indicate otherwise[6]. For the purposes of this report, the development plan is

    a. The North Yorkshire County Structure Plan; and

    b. Harrogate District Local Plan.

    Material planning considerations include government guidance in Planning Policy Statements; statutory duties in relation to conservation areas and the environmental quality and character of the area.

10. The development is in the Nidderdale Area of Outstanding Natural Beauty (AONB). The Countryside Agency is empowered, following consultation with the local council, to designate certain areas of the country as AONBs. The purpose of the designation is to conserve and enhance the natural beauty of the area[7]. Once designated, some of the provisions which apply to National Parks apply equally to AONBs[8]. When exercising or performing any of its functions in relation

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3 **Code Conduct, paragraphs 8 and 15**

4 **Porter v Magill [2002] 2 AC and Costas Georgiou v London Borough of Enfield [2004] QBD**

5 **A councillor is a member of his council. A reference to the Members is therefore a reference to the Councillors.**

6 **Planning & Compulsory Purchase Act 2004, Section 38(6)**

7 **Countryside and Rights of Way Act 2000, section 82**

8 **Countryside and Rights of Way Act 2000, section 84 incorporating provisions of the National Parks and**

to an AONB, the Council must have regard to conserving and enhancing the natural beauty of the area[9].

11. By law 'natural beauty' embraces flora, fauna, geological and physiological features[10] but beyond that the term is not exhaustively defined. However, the Countryside Agency says a key concept of natural beauty in landscape is its distinctive character, the presence of key characteristics, absence of atypical or incongruous features and its state of repair as well as how intact it is. Whilst the statutory criterion must be one of relative 'naturalness' it may have been moulded by centuries of human activity[11].

12. Government policy is to give landscapes with national designation the highest level of protection[12]. The Government says that new building development in the open countryside away from existing settlements, or outside areas allocated for development in development plans, should be strictly controlled. Planning permission for isolated new houses in the countryside should only be granted if, following thorough scrutiny, it is accepted there is special justification for them[13]. The conservation of the natural beauty of the landscape and countryside should therefore be given great weight in planning policies and development control decisions in these areas[14]

13. The North Yorkshire County Structure Plan says that, within the Nidderdale AONB, priority will be given to conservation of the natural beauty of the landscape and there will be a presumption against new development except where it can be shown to be necessary in that location[15]. It says development should, wherever possible, be located in or adjacent to existing settlements[16].

14. Harrogate District Local Plan gives high priority to protecting the natural beauty of Nidderdale[17] and to protecting the visual character of an area[18]. It reaffirms that

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**Access to the Countryside Act 1949.**

**9 Countryside and Rights of Way Act 2000, section 85**

**10 National Parks and Access to the Countryside Act 1949 as amended by the Environment Protection Act 1990 and section 61(1) of the Environment Act 1995.**

**11 Meyrick Estate Management Ltd and Others –v- Secretary of State for Environment Food & Rural Affairs [2005]EWHC 2618 (Admin)**

**12 Planning Policy Statement 1: Delivering Sustainable Development, paragraph 17.**

**13 Planning Policy Statement 7: Sustainable Development in Rural Areas, paragraphs 1 (iv) ; 10 and Annex A paragraphs 1 and 2.**

**14 Planning Policy Statement 7: Sustainable Development in Rural Areas, paragraph 21.**

**15 North Yorkshire County Structure Plan, Policy E1**

**16 North Yorkshire County Structure Plan, Policy C1**

**17 Harrogate District Local Plan, Policy C1**

**18 Harrogate District Local Plan, Policy C2**

new houses in the countryside will not be permitted without special justification (such as a need for farm or forestry workers to live at their place of work)[19].

15. At the time of events described in this report the Council had adopted a Scheme of Delegation for planning decisions which provided that decisions could be taken by one of three Area Development Control Committees. Contentious decisions, however, such as

    - the determination of a matter deemed by the Solicitor to the Council to be contrary to policy approved by the Council for development control purposes; or

    - the determination of a matter contrary to a recommendation of the Head of Planning Services

    could not be implemented but had to be held over pending a Special Procedure.

16. Under the Special Procedure, the matter was deferred for a minimum of one Committee cycle to permit consultation with the Cabinet Member for Planning for any observations on policy, and the Solicitor to the Council for observations on any legal issues. According to the Cabinet Member for Planning's portfolio, his responsibilities include acting as guardian of the development plan and ensuring its policies are applied consistently. Observations of those two individuals had then to be reported to the Area Development Control Committee which was obliged to consider them and give them due weight in making a new decision.

## Investigation

### Background

17. In 1990 Mr and Mrs Atkinson bought a field opposite their home in the Nidderdale AONB. The field had a history. From the 1940s it had accommodated a caravan which was home to a local woman, Miss Richards. According to the records, Miss Richards left her caravan around 1966. Between then and 1990 there is no record of anyone living in the caravan which was vandalised and fell into disrepair, leaving in 1990 only a chassis as evidence of its former existence.

18. In 1991, the year after they acquired the land, Mr and Mrs Atkinson put another caravan in the field and submitted a planning application for the erection of a detached bungalow and garage in its place. The record shows the site was visited on 7 March by a planning officer for the Council who noted that the grass beneath the caravan was green, suggesting it had only recently been put there. The planning officer also said she was familiar with the site. She passed periodically along the road and during the preceding six months could attest to their having been no caravan there. The Parish Council was approached for

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19 Harrogate District Local Plan, Policy H7.

information. On 5 March 1993, it wrote to say Miss Richards' old caravan had been unoccupied for 25 years and, although a new caravan had appeared on the site in 1991, to the best of parishioners' knowledge, it had never been occupied. The planning application was withdrawn, but the caravan remained on the site.

19. The record indicates that in the mid-1990s enforcement action to have the caravan removed was considered and preliminary enquiries to establish the history of the site were made of the Atkinsons but no formal action was taken. In the late 1990s, in response to complaints from the public, an informal approach from the Parish Council to a Borough Councillor and frustration amongst some of the Council's own officers, there was a further spurt of activity. Miss Richards' cousin was approached for a statement. She said Miss Richards had lived away for many years but had at some stage returned to oversee the removal of her caravan from the site. The cousin had moved out of the area but said that when she and her husband returned in the early 1990s, they noted the field was then, for some months, without trace of the caravan. In response to a formal notice served by the Council in 2000, Mrs Atkinson and her husband said their son had lived in the caravan between 1991 and 1996 and they were currently refurbishing it for their daughter. They say Miss Richards did not remove her caravan but that they did, before replacing it in 1990. No further action appears to have been taken.

20. In May 2002 Mrs Atkinson became a Borough Councillor.

21. Mr and Mrs Miles say that when diggers arrived at the site about four years ago to lay drains for a new septic tank and a new caravan arrived complete with kennels and a shed, they wrote to the Council to complain. They say their letter was acknowledged but they received no response. Within the Council, however, legal officers had been approached for guidance as to whether there was sufficient reliable information on which to pursue enforcement action. Their provisional view was that it would be helpful to establish whether Miss Richards had abandoned her caravan when she went to live elsewhere or whether her absence was temporary and residential occupation was legally dormant.

22. Miss Richards' cousin was approached again and the record of a telephone conversation between her and an officer of the Council in March 2004 says that when Miss Richards visited relatives in the area, it was not to the caravan she returned. She stayed with the cousin's mother (her aunt) in Harrogate. From this the cousin says she inferred Miss Richards did not intend to return to the caravan.

23. On the basis of this conversation, a questionnaire was prepared for the cousin to send to Miss Richards to complete and further enquiries were made of Councillor and Mr Atkinson.

24. Councillor Atkinson responded to the letter sent to her on 24 March 2004. She said Miss Richards paid local taxes on the property from the mid-1940s until

1990, Councillor Atkinson's son lived there for five years between 1991 and 1996 and her daughter for approximately two years thereafter. The caravan had been occupied by a tenant since June 2003. Councillor Atkinson sent a copy of her response to the then Chairman and Vice-Chairman of the Area Planning Committee, Councillor Simms and Councillor Ellington.

25. Miss Richards did not respond to the questionnaire. In response to a draft of this report, an agent acting on behalf of Councillor Atkinson pointed out that Miss Richards had died in 2003 and her cousin's failure to mention this in 2004 cast doubt on the value of her information. An officer of the Commission traced Miss Richards' surviving brother and executor of her estate. He confirmed that his sister had died in 2003. He said he had lost contact with his cousin and did not know what contact she had had with his sister. He says his sister lived (in a southern town) for many years before her death. He says: "I don't think it was her intention to return. She had her house down here."

**The Planning Application**

26. On 8 March 2005 Councillor and Mr Atkinson applied for outline planning permission to replace what they described as a permanently occupied static caravan with a traditional dwelling.

27. The record shows that a planning officer posted a site notice on the field gate on 21 March and, when interviewed by an officer of the Commission, he said he passed the site almost daily and the notice remained in place. Because the Council considered the application was of concern to the wider public, it was also advertised in the local press. The Council adopts a voluntary neighbour notification policy but says Councillor Atkinson elected not to follow this.

28. Mrs Miles says she and other villagers were watching the site because they suspected that its recent activity was the precursor to a planning application. They saw no notice, to which they would certainly have objected, and the first they knew of the development was reading, in the local press, that it had been approved by the Council.

**The First Committee Meeting**

29. The application was considered by the Area Committee on 19 April. Of the 10 Committee Members, seven attended. Councillor Atkinson declared an interest and withdrew from the meeting leaving six Members. No other interest was declared.

30. In his report to the Committee, the Planning Officer said the applicants had an established right to site the caravan in the field but whether residential use had also been established remained undetermined. The Officer nonetheless pointed out that the application was contrary to national and local policies and that, other

than "replacing a permanently occupied static caravan" no justification for a dwelling on the site had been submitted.

31. The report cited 13 material policies, six of which the application contravened. Members were reminded that the AONB enjoyed the highest status of protection in relation to landscape and scenic beauty and that great weight had to be given to its conservation. There was a presumption against unnecessary development outside existing settlements. The report described the static caravan with its associated wooden hut, red propane gas cylinders and small kennel sized structures as prominent from the road, visually intrusive and seriously harming the pastoral beauty of the area and the natural beauty of the AONB. The report also pointed out that whilst the caravan had no curtilage, the application included an extensive surrounding area of proposed residential curtilage within which many associated changes could take place without planning control. The report asked Members to be mindful of setting a precedent and strongly recommended that permission be refused.

32. Representations were received only from the Parish Council. It said the application was very emotive, particularly with newer residents to the village, that it fell outside the village envelope and that there was no agricultural connection. However, no formal objection was made because the applicants "had proved their lawful right for the existing static caravan."

33. The record shows that when the application was debated, Councillor Ellington proposed an alternative, less controversial site closer to the village and proceedings were interrupted to enable Councillor Atkinson's agent to establish from her whether she owned the land in question. Officers objected and Councillor D moved refusal of the application. His proposal was lost on the Chairman, Councillor Simms', casting vote. Another Councillor moved approval. Councillors Simms, Ellington and Elwyn Hinchcliffe supported approval of the application against the officer's recommendation. Councillors D, E and F opposed it. The motion was carried on the Chairman, Councillor Simms' casting vote.

34. The reason given for approving the application was that removal of the existing static caravan would improve the current situation. Because approval was contrary to the officer's recommendation, the decision was deferred under Special Procedures for further consultation with the Cabinet Member for Planning and the Council's Solicitor (see paragraphs 15 and 16 above.)

**The Intervening Period**

35. Following the Committee's decision officers made a further attempt to determine whether residential use of the caravan had been established. A formal notice was served on Councillor and Mr Atkinson requesting clarification of the information they had already supplied.

36. A Member of the Area Planning Committee also complained to the Chief Executive about the role of the Chairman, Councillor Simms, whose casting vote secured approval of an application, contrary to Council policies and in favour of a fellow Councillor whom he was known to drive to and from all Council meetings. He also complained about the Vice-Chairman, Councillor Ellington for his role in trying to broker a deal between the Council and the applicant whereby, if the application were refused, another site might receive more favourable consideration. It was said that Councillors Simms and Ellington and the applicant, Councillor Atkinson, were close friends who represented adjacent agricultural wards. Responding to the Chief Executive's enquiry into the complaint, a senior officer noted that Councillor Atkinson had previously copied Councillors Simms and Ellington into her correspondence about the site and that Councillor Simms had "admitted to officers that he had had his ear bent at length about this application although he did not say by whom."

**The Second Committee Meeting**

37. The application was reconsidered by the Area Committee on 20 September. Again seven of the 10 Members attended but they were not the same seven as attended the previous meeting. Councillors E and F did not attend but Councillors G and H did. Councillor Atkinson declared an interest and withdrew from the meeting again leaving six Members. Amongst the other Members present, no other interest was declared.

38. The officer's report was substantially unchanged but added that information given by Councillor and Mr Atkinson in response to the formal notice led the Council to conclude that residential use of the caravan was probably immune from enforcement. Nevertheless, the report recommended that because the application was contrary to relevant Council policies and no justification had been offered for a house on the site, the application should be refused.

39. The Cabinet Member for Planning declined to comment on the application, declaring an interest as the applicant was known to him.

40. The Solicitor to the Council said: "In the absence of exceptional reasons to justify it, the development is contrary to policy. It will recur and if Members are minded to approve it they need to consider what factors in this situation make it different from other similar applications which are likely to be brought in the future."

41. As before, Councillors Simms, Ellington and Elwyn Hinchcliffe supported approval of the application against the officer's recommendation. Councillors D, G, and H opposed it. The motion was carried on the Chairman, Councillor Simms', casting vote. Reasons for approving the decision were as follows:

    - it was considered that there would be a visual improvement in the area if the caravan was removed and an appropriate designed dwelling constructed in its place; and

- the caravan was not located on a designated site and it is not thought the proposal would cause any detriment to the visual amenity of the Nidderdale AONB.

**A Full Planning Application**

42. In April 2006 Councillor and Mr Atkinson applied for full planning permission for a detached dwelling and a new 'package treatment plant' on land adjoining the site on which the outline permission had been granted. Their agents indicated that they would be willing to enter into an agreement with the Council to remove the caravan and not implement the outline permission provided permission were given for the new application. Because the new application was considered to be even more harmful to the landscape than the original application, officers recommended refusal.

43. Councillor Atkinson and Councillor Simms declared a prejudicial interest and withdrew from the meeting. All other Members declared a personal interest in the item either because they were fellow councillors or because they were fellow councillors of the same political party. The application was refused because it was contrary to policy, lacked special justification, lay outside the village boundary, would seriously harm the character of the area and the natural beauty of the AONB and because the proposed siting and design did not reflect the character of traditional buildings in the area. Nor was it in an inconspicuous location or landscaped accordingly.

**What the Councillors say**

44. Councillors D, E, F, G and H all voted to refuse the application either at one, other or both meetings. When interviewed by my investigating officer, all were unequivocal that the applicants had demonstrated no need for residential development of the site and, as such, there was no justification for it. Without special justification, it was contrary to all policy. That a house might look better than a caravan was, in their general view, immaterial. One Member commented that this was specifically contrary to their training as it would enable any farmer to let a field go to rack and ruin and tell the Council that he would tidy it up, subject to the grant of permission for a house. This Member specifically objected to caravans being used as a 'back door' to residential planning permission. Another said he was uneasy about the false curtilage on the application site and two Members expressed concern about the public's perception of favouritism when Councillor Simms and the applicant were known to drive to and from Council meetings together, to drive to all site visits together and, it was suggested, attend agricultural fairs together. It was alleged that Councillor Simms had once driven Mr Atkinson's vintage tractors at a fair. None found the decision difficult as, they say, given the long list of policies to which it was contrary, the weight of argument fell so heavily on the side of refusal.

45. Councillors Simms (Chairman), Ellington (Vice-Chairman), and Elwyn Hinchcliffe all voted to allow the development. All said they considered a house would look better than a caravan and that amounted to special justification.

46. Councillor Simms acknowledges that he drives Councillor Atkinson to and from Council meetings, as he did in both April and September, and says the Council has introduced a car sharing policy. The round journey which they share is approximately 40 miles. Councillor Simms says he has never driven a vintage tractor belonging to Mr Atkinson although both have driven vintage tractors at the same event. Councillor Simms drove a tractor belonging to a Mr James who had been best man at his wedding but who was now a close friend of the Atkinsons.

47. Councillor Simms says that outside Council business he comes into contact with Councillor and Mr Atkinson at political, church and village social functions, typically a couple of dozen times a year. Councillor Simms says he cannot recall saying he had "had his ear bent." He says if he had it would either have been by the Chairman of the Parish Council who supported Councillor Atkinson's application and whose wife was his tennis partner or by Councillor Atkinson herself but that would have been specifically about the delay between the April and September meetings, not about the application itself which they did not discuss. Councillor Simms says he withdrew from the April 2006 meeting when another Member of the Committee suggested before the meeting that, because he drove Councillor Atkinson to and from meetings, their association was too close. Councillor Simms says he has no recollection of receiving a copy of the letter in March 2004 (see paragraph 24 above.)

48. Councillor Ellington says he was Chairman of the AONB Committee at the time of both the April and September meetings and, because there was already a caravan on the site, did not consider the decision would cause the AONB harm. Councillor Ellington says he was aware of the policy but probably did not give any weight to it. He says he does not meet Councillor and Mr Atkinson outside the Council as they share no common interests.

49. Councillor Elwyn Hinchcliffe says he has known Councillor and Mr Atkinson through a mutual friend for 15 years but, before he was elected to the Council in 2004, rarely met them. He says he has met them at a barbeque at the friend's house and more recently at one social function.

**What the Cabinet Member for Planning says**

50. The Cabinet Member for Planning says he declined to comment under the Special Procedures because he had a prejudicial interest. He says that although Councillor Atkinson was known to him "probably less well than she is to her Area colleagues" she was part of an electorate which voted him into a paid position, that of Deputy Leader of the Council. The deputy leadership was due to be contested two weeks after he was approached for his comments and, as he had won the previous year by one vote, at interview he said "there could have been a

public perception of support for a colleague" and "Councillor Atkinson would not have liked my decision." He says he would have supported the officer's recommendation because his role as Cabinet Member is to uphold the Council's policies.

51. In commenting on a draft of this report, the Cabinet Member says that he considered that he had a prejudicial interest (ie a member of the public, knowing of his Council relationship with Councillor Atkinson would reasonably regard it as so significant that it would be likely to prejudice his judgement of the public interest) and that this was the only reason that he did not comment. He now says that if he had acted in any other way "...a member of the public could have assumed I had used my position to support someone who might support me or penalise someone who might not support me in the forthcoming deputy-leadership ballot."

**Other Enquiries**

52. The Valuation Office in London retains records from 1993 but not before. It says property taxes were paid for the caravan between 1993 and 1996 when a request was made to have the caravan removed from the valuation list. It was not reinstated until 1 June 2003.

53. The Royal Mail Delivery Office says the area has had the same postman for the past 25 years. During most of that time the postman says the caravan on the site was not capable of occupation and no deliveries to the land were made. Mail has only been delivered to the site during the past 3 years.

54. The Council's refuse collectors say two officers have worked that round for the past 26 years and neither has ever collected rubbish from the caravan.

55. The Chairman of the Parish Council says that whilst Councillor Atkinson is not a Parish Council member, she attends Parish Council meetings. He recalls having seen the planning notice on the field gate last April. The clerk to the Parish Council confirms Councillor Atkinson was present throughout the meeting which discussed her application.

56. A complaint against Councillor Simms was made to the Standards Board in October 2005. The Standards Board says it was given insufficient information to pursue the complaint.

**What Councillor Atkinson says**

57. Councillor Atkinson says the planning notice was on the field gate for 21 days and would have been apparent to pedestrians using the neighbouring footpath. She did not notify her neighbour because the property next to hers is occupied by a family member who was aware of their application anyway. Councillor Atkinson says she was told Miss Richards paid taxes on the caravan until 1990. The only

documentary evidence she has is a letter, a copy of which she produced, written to an unidentified woman in 1990 confirming that there would be no community charge in respect of the then unoccupied caravan. Councillor Atkinson says her son had his post delivered to the family home across the road and that both her son and daughter took their bagged rubbish to a collection point on the edge of the village.

## Conclusion

58. The Council accepted that Councillor Atkinson had an established right to station a caravan on her land. Whether residential use of the caravan was abandoned sometime between 1966 and 1990 had not been determined by the Council by the time of its April 2005 meeting. Between the April and September meetings fresh enquiries were made and information supplied by the applicant inclined the Council to the view that residential use was probably immune from enforcement. The issue which fell to be determined by the Council in April 2005 had nothing to do with the caravan. It was the separate matter of whether planning permission for a house should be granted on the site.

59. The Members Code of Conduct says that a Councillor must not use his position improperly to confer on or secure for himself or anyone else any advantage or disadvantage. Councillors who belong to a political group must declare a personal interest in any planning application by a member of the same political group. Provided that interest is not also prejudicial they can then take part in the meeting and vote. All the Councillors who were members of the same political party as Councillor Atkinson should therefore have declared an interest at both the April and September 2005 meetings.

60. The Code and recent case law have defined what amounts to a prejudicial interest. To paraphrase, the only Councillors who should have considered and voted on the application were those whose relationship with Councillor Atkinson would not lead a member of the public to think that their decision, because of that relationship, would be biased.

61. The Chairman of the Area Committee, Councillor Simms, was in the habit of driving Councillor Atkinson to and from Council meetings, a journey which will have taken over 30 minutes each way. Sharing cars in a rural community is a courtesy, apart from making good economic sense. However, over time this brought the two into sufficiently close contact for fellow Councillors to express unease amongst themselves, for one Councillor to make a complaint to the Chief Executive of the Council, for another Councillor to suggest that Councillor Simms should take no further part in consideration of Councillor Atkinson's planning applications, for a member of the public to make a complaint to the Standards Board and for another member of the public to make a complaint to me.

62. The association between Councillor Simms and Councillor Atkinson furthermore was not confined to Council business. Church functions, political events, village gatherings and mutual friends brought the two families together, on average, once a fortnight. Councillor Simms, whose casting vote was decisive in Councillor Atkinson's favour, had a clear prejudicial interest and, by failing to acknowledge and declare it, he breached the Code of Practice. Without Councillor Simms' votes Councillor Atkinson's application would have been defeated. The involvement of Councillor Simms in both decisions was maladministration.

63. It is open to Members to reach a decision other than that recommended by the officers, but they must do so for sound planning reasons. The Members who supported the officers felt the weight of argument was heavily in their favour – and they had substantial national and local policies to back them up. By comparison, there is no evidence that the three who voted contrary to the officers' recommendation gave significant weight to any of the policies, but based their decision simply on the grounds that a house would look better than a caravan – which was not on a designated site – and the house would not, in their view, be detrimental to the visual amenity of the AONB.

64. The material criterion of the AONB is natural beauty, which is not the same as visual amenity. Whilst a house may offer more visual amenity than a caravan outside the AONB, neither can be said to contribute to natural beauty within the AONB but in the circumstances of this case, the Council could, significantly, maintain more control over the domestic paraphernalia attaching to the caravan than the extensive curtilage proposed for the house. Within the AONB, policy prevents development unless it can be shown to be necessary in that location. Justification can only be met by necessity, not as the Members suggest, by substituting one incongruous feature for another. From the written record and from information subsequently given to my investigating officer, it is apparent that reasonable weight was not given by Councillors Ellington and Elwyn Hinchcliffe to the material policies whilst they gave substantial weight to considerations of, at best, questionable relevance to an application for development in the AONB. This was maladministration.

65. The Cabinet Member for Planning had a Constitutional duty to comment upon the proposal. He relieved himself of this duty because, he says, Councillor Atkinson had a vote in a contest he had entered for a position carrying a financial allowance and a member of the public might perceive this as likely to colour his judgement. It is true that a member of the public knowing this might believe he would be prejudiced and in many circumstances the wisest course of action would be to withdraw. However, in this case the failure to uphold and champion the Council's Unitary Development Plan policies was beneficial to Councillor Atkinson. If the Cabinet Member had commented that the proposal was contrary to the Council's policy, would a reasonable member of the public believe that his connection with Councillor Atkinson had prejudiced his judgement of the public interest? The Cabinet Member may have been entitled to take the view he did

but, under the circumstances, he should have ensured that a substitute was appointed to discharge his Constitutional duties on his behalf. Failure to do so may have contributed to the maladministration.

66. It cannot be proven whether the Council would have been able to get to the bottom of the caravan's history if it had made more robust enquiries when the issue first arose in 1991. If the land had been bought with established rights to site a residential caravan, this is likely to have been reflected in the price paid and evidenced by an affidavit from the vendor. The Council is entitled to prioritise business within its resources but it has a duty too to maintain the public's confidence. The difficulty officers appear to have experienced in getting to grips with this issue raises issues about their training, supervision and support which the Council needs to address..

67. I accept that the Council publicised the planning application in accordance with the regulations. It is unfortunate that Mr and Mrs Miles, who were on the lookout for a notice, did not see it.

68. As Councillor Atkinson was not a member of the Parish Council she was under no obligation to withdraw from the meeting which discussed her application.

69. Between 1996 and 2003 no taxes were paid for the caravan yet Councillor Atkinson is on the record as saying her daughter lived there for two years during that period. The public has a right to expect that those who are liable for taxes pay them and a right to expect the Council to pursue them when they have not.

## Remedy

70. In response to the draft of this report the Council agreed:

    a. To consider what action it should take to cancel the planning permission which was improperly obtained. The Council accepts that this may require an order of the court. In the meantime, the Council has agreed that any consideration of reserved matters under the current planning permission will be dealt with in the light of this report.

    b. To review the training it currently offers to Members to clarify any areas of doubt surrounding personal friendships. I am pleased to note that the Council has also, since events reported here, revised its Planning Scheme of Delegation giving it now a single 16 Member Planning Committee with responsibility for determining planning applications across the Borough. Both these steps should strengthen its probity and ethical framework.

    c. To consider whether it is appropriate for it to take enforcement action to remove the kennels, sheds and other structures surrounding the caravan.

71. The Council should investigate whether all council tax due on the caravan has been paid and take appropriate action if it has not.

72. The Council should review the training and support it offers its enforcement officers.

73. The Council should formally thank the complainants for bringing their concerns into the public arena and apologise to them for failing to respond to their earlier correspondence as it should have done.

74. I commend the Council for its positive response to the criticisms within this report and its willingness to take appropriate action.

**Anne Seex**
**Local Government Ombudsman**
**Beverley House**
**17 Shipton Road**
**YORK YO30 5FZ**

**14 December 2006**

APPENDIX TWO

the Standards Board for England

## Harrogate Borough Council

| | |
|---|---|
| **Case no.** | SBE17109.07 |
| **Member:** | Councillor Nigel Simms |
| **Authority:** | Harrogate Borough Council |
| **Date received:** | 04 Jan 2007 |
| **Date completed:** | 26 Jul 2007 |

**Allegation:**

The member brought their office or authority into disrepute, failed to disclose a personal interest, failed to withdraw from a meeting in which they had a prejudicial interest and failed to complete the register of interests.

**Standards Board outcome:**

The ethical standards officer found that, in the circumstances of the case, no action needs to be taken.

The complainant alleged that Councillor Nigel Simms failed to disclose a personal interest in a planning application and failed to withdraw from the room despite the interest also being prejudicial at development control meetings in April and September 2005. The application was submitted by a member of Councillor Simms' political group on the council, with whom Councillor Simms regularly socialised.

The ethical standards officer also investigated whether Councillor Simms had failed to register his membership of the Nidderdale Area of Outstanding Natural Beauty Joint Advisory Committee (AONB JAC) and whether by his alleged conduct, Councillor Simms had brought his office or authority into disrepute.

Councillor Simms stated that he often gave the applicant a lift to council meetings as her house was on the way there and the council operates a car-sharing policy, but he did not believe this made them friends. Councillor Simms stated that the journey took about 15 minutes, during which they would make polite small talk. They meet on occasions at political, church and large-scale social functions, but no particular friendship exists between them, and they had met socially only three or four times since first meeting one another in 2002.

The ethical standards officer considered that the AONB JAC was a body exercising public functions to which Councillor Simms was nominated to represent the council. By not registering his membership in the register of members' interests, Councillor Ellington had failed to comply with the Code of Conduct.

The ethical standards officer considered that as the planning application in question related directly to the AONB JAC, Councillor Simms had a personal interest in the application, which he should have disclosed under the Code. However, the ethical standards officer did not consider that the personal interest stemmed from the applicant being a fellow councillor, as the application was not related to the political group of which they were both members and was submitted in the applicant's private capacity. The nature of the social contact between them was not enough to constitute a friendship under the Code

of Conduct. Councillor Simms' membership of the AONB JAC did not amount to a prejudicial interest.

The ethical standards officer considered that Councillor Simms and other members who voted against the officers' recommendation to refuse the planning application at the April 2006 meeting had shown poor judgment in doing so and in not deferring considering the application until a legal matter relating to it was resolved. However, the ethical standards officer did not consider that Councillor Simms' conduct was such as to bring his office or authority into disrepute.

The ethical standards officer found that, in the circumstances of the case, no action needs to be taken.

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**Relevant paragraphs of the Code of Conduct**

The allegations in this case relate to paragraphs 4, 5(a), 9, 12, and 15 of the Code of Conduct.

Paragraph 4 states that "a member must not in his official capacity, or any other circumstance, conduct himself in a manner which could reasonably be regarded as bringing his office or authority into disrepute".

Paragraph 5(a) states that a member "must not in his official capacity, or any other circumstance, use his position as a member improperly to confer on or secure for himself or any other person, an advantage or disadvantage".

Paragraph 9 states that "a member with a personal interest in a matter who attends a meeting of the authority at which the matter is considered must disclose to that meeting the existence and nature of that interest at the commencement of that consideration, or when the interest becomes apparent".

Paragraph 12 states that a member with a prejudicial interest in any matter must "withdraw from the room or chamber where a meeting is being held whenever it becomes apparent that the matter is being considered at that meeting".

Paragraph 15 states that "within 28 days of the provisions of the authority's code of conduct being adopted or applied to that authority or within 28 days of his election or appointment to office (if that is later), a member must register his other interests in the authority's register maintained under section 81 (1) of the Local Government Act 2000 by providing written notification to the authority's monitoring officer of his membership or position of general control or management" in a number of listed organisations, including charitable bodies and trade unions.

APPENDIX THREE

# The Queen on the Application of Michael Gardner v Harrogate Borough Council

CO/1121/2007

High Court of Justice Queen's Bench Division The Administrative Court

19 November 2008

**[2008] EWHC 2942 (Admin)**

**2008 WL 5044336**

Before: Mr Justice Sullivan

Wednesday, 19 November 2008

## Representation

- Mr Andrew Sharland (instructed by Harrogate Borough Council ) appeared on behalf of the Claimant.
- Mr Martin Carter (instructed by Barker Titleys ) appeared on behalf of the Interested Parties.

## Judgment

Mr Justice Sullivan:

## Introduction

1 In this application for judicial review, the claimant seeks a quashing order in respect of an outline planning permission dated 22 November 2005, granted by the defendant to the interested parties, for the removal of an existing static caravan and the erection of a dwelling on a field, OS No 5419, at Kirkby Malzeard ("the site"), owned by the interested parties. Although the Harrogate Borough Council ("the Council") is nominally the defendant in these proceedings, it does not resist the claim.

2 The claimant is the leader of the Council, and in reality the Council is seeking the quashing of the planning permission because it accepts, in the light of an adverse report dated 14 December 2006 by the Local Government Ombudsman ("the Ombudsman"), that the grant of permission was procedurally flawed because there was apparent bias on the part of the Chair of the Council's Area Planning Development Control Committee ("the Committee") on whose casting vote the planning permission was granted.

## Factual background

3 The factual background is set out in some detail in the Ombudsman's report, and there is no need to rehearse it in this judgment. In brief summary, Mrs Atkinson became a Conservative Borough Councillor on 2 May 2002. In March 2005, she and her husband applied for the outline planning permission in question. The planning officers' report recommended refusal of the application for the following reason:

> "No special justification for a dwelling in the particular location has been given and the development would be outside the built up confines of Kirkby Malzeard in the countryside where it would seriously and adversely harm the character and natural beauty of the Nidderdale AONB [Area of Outstanding Natural Beauty] and consequently the development would be contrary to North Yorkshire County Structure Plan Policies E1 and H7 and Harrogate District Local Plan Policies C1, C15 and H7."

4 On 19 April 2005, the Committee resolved that it was minded to grant planning permission on the casting vote of the Chair, Councillor Simms, who was also a Conservative Councillor. In accordance with the Council's scheme of delegation, the application was deferred to a later Committee meeting on 20 September 2005. Again, the officers' report "strongly recommended" a refusal of planning permission. The recommended reason for refusal was in even more emphatic terms, and the Committee were advised by the planning officers that they should consider the question of precedent:

"In the absence of exceptional circumstances to justify it, the development is contrary to policy. If members are minded to approve them, then they need to consider what are the factors in this situation which make it different from the other similar applications which are likely to be brought in the future."

5 The Committee, again on Councillor Simms' casting vote, resolved to approve the application. The Committee's reasons for approval, contrary to their officer's recommendations, were as follows:

"1. It was considered that there would be a visual improvement in the area if the caravan was removed, and an appropriate designed dwelling constructed in its place.

2. The caravan was not located on a designated site and it is not thought the proposal would cause any detriment to the visual amenity of the Nidderdale AONB."

6 A local resident in Kirkby Malzeard complained to the Ombudsman, who commenced an investigation. In February 2006, the interested parties made a second application for planning permission for the same form of development on land immediately adjoining the earlier application site. That application was considered by the Council's Area Planning Committee on 25 April 2006. Again, the planning officers recommended refusal, essentially for the same policy reasons as they had recommended refusal of the first application. On this occasion, Councillor Simms declared a prejudicial interest and left the meeting prior to its consideration of the interested parties' application. The Committee, by a majority, refused the second planning application for the policy reasons recommended by the planning officers:

"1. The siting of the proposed dwelling is outside the development limit for Kirkby Malzeard in the open countryside. There is inadequate special justification for a dwelling in the particular location and consequently the development would be contrary to North Yorkshire Structure Plan Policy H5, Harrogate District Local Plan Policy H7 and Kirkby Malzeard Village Design Statement Policies SPC2 and SPC3.

2. The proposed siting and design including the vehicular access and extent of parking does not reflect the character of traditional buildings in the locality; is not adjacent to an existing group of buildings or significant trees; is not in an inconspicuous location; is not accompanied by an integral landscaping scheme; and would seriously and adversely harm the character of the area and the natural beauty of the Nidderdale AONB and consequently the development would be contrary to North Yorkshire County Structure Plan Policy E1 and Harrogate District Local Plan Policies C1, C2, C11, C15, HD20, A1, H18 and the Kirkby Malzeard Village Design Statement Policy BD1."

7 On 14 December 2006, the Ombudsman issued her final report. In paragraph 7 of her report she set out the relevant test for apparent bias:

"The test, the courts have held, is not just actual bias but the appearance of bias; whether a fair minded and informed observer, with knowledge of the facts, would conclude that there was a real possibility of bias."

In a footnote, the Ombudsman referred, inter alia, to the case of Porter v Magill [2002] 2 AC 357 . The conclusions in the Ombudsman's report that are relevant for present purposes are contained in paragraphs 59 to 63 and are as follows:

"59. The Members Code of Conduct says that a Councillor must not use his position improperly to confer on or secure for himself or anyone else any advantage or disadvantage. Councillors who belong to a political group must declare a personal interest in any planning application by a member of the same political group. Provided that

> interest is not also prejudicial they can then take part in the meeting and vote. All the Councillors who were members of the same political party as Councillor Atkinson should therefore have declared an interest at both the April and September 2005 meetings.
>
> 60. The Code and recent case law have defined what amounts to a prejudicial interest. To paraphrase, the only Councillors who should have considered and voted on the application were those whose relationship with Councillor Atkinson would not lead a member of the public to think that their decision, because of that relationship, would be biased.
>
> 61. The Chairman of the Area Committee, Councillor Simms, was in the habit of driving Councillor Atkinson to and from Council meetings, a journey which will have taken over 30 minutes each way. Sharing cars in a rural community is a courtesy, apart from making good economic sense. However, over time this brought the two into sufficiently close contact for fellow Councillors to express unease amongst themselves, for one Councillor to make a complaint to the Chief Executive of the Council, for another Councillor to suggest that Councillor Simms should take no further part in consideration of Councillor Atkinson's planning applications, for a member of the public to make a complaint to the Standards Board and for another member of the public to make a complaint to me.
>
> 62. The association between Councillor Simms and Councillor Atkinson furthermore was not confined to Council business. Church functions, political events, village gatherings and mutual friends brought the two families together, on average, once a fortnight. Councillor Simms, whose casting vote was decisive in Councillor Atkinson's favour, had a clear prejudicial interest and, by failing to acknowledge and declare it, he breached the Code of Practice. Without Councillor Simms' votes Councillor Atkinson's application would have been defeated. The involvement of Councillor Simms in both decisions was maladministration.
>
> 63. It is open to Members to reach a decision other than that recommended by the officers, but they must do so for sound planning reasons. The Members who supported the officers felt the weight of argument was heavily in their favour - and they had substantial national and local policies to back them up. By comparison, there is no evidence that the three who voted contrary to the officers' recommendation gave significant weight to any of the policies, but based their decision simply on the grounds that a house would look better than a caravan - which was not on a designated site - and the house would not, in their view, be detrimental to the visual amenity of the AONB."

8 In paragraph 70 the Ombudsman noted that, in response to the draft of her report, the Council had agreed-

> "To consider what action it should take to cancel the planning permission which was improperly obtained. The Council accepts that this may require an order of the court. In the meantime, the Council has agreed that any consideration of reserved matters under the current planning permission will be dealt with in the light of this report ..."

9 In paragraph 74, the Ombudsman commended the Council "for its positive response to the criticisms within this report and its willingness to take appropriate action".

10 The Council's Cabinet considered the Ombudsman's report on 3 January 2007, and unanimously resolved to fund this application for judicial review by the claimant. The Council's reasons included the following:

> "The decision made in September 2005 was clearly improper and should not be allowed to stand. An application for judicial review, if successful, would lead to the court quashing the outline planning permission. This would enable the authority, if the applicant requires, to reconsider the application on its merits in accordance with the law and the Council's policies."

### Apparent bias - the correct legal test

11 Pausing there, it is common ground that the Ombudsman correctly set out the relevant test for apparent bias. On behalf of the interested parties, Mr Carter referred to the Court of Appeal's decision in Persimmon Homes Teesside Limited v R (on the application of Lewis) [2008] EWHC Civ 746 , in support of the proposition that, in applying that test, the court must bear in mind the surrounding context. For present purposes, that context includes the fact that, in addition to being members of the same political party, councillors will often be friends or acquaintances and will have social and other dealings with one another. Although Persimmon is readily distinguishable on its facts (it was a "pre-determination" case), I would readily accept, in principle, the proposition advanced by Mr Carter. The fair-minded and informed observer's consideration of the facts would surely include the surrounding context, and in the present case that context would include the fact that Mrs Atkinson and Councillor Simms were fellow councillors, and as such would be likely to be acquainted with each other to some degree or other.

### The court's approach to the Ombudsman's report

12 Mr Carter took issue with the submission of Mr Sharland, on behalf of the claimant, that the court, while not bound by the Ombudsman's report, should not depart from it unless there was a "very good reason" to do so. I accept, of course, that the court has to ascertain the relevant facts for itself, and that in doing so, it is not bound by the Ombudsman's findings. It may well be that Mr Sharland's test of "very good reason" pitches the threshold somewhat high. However, as a matter of practical reality, where the Ombudsman has not merely looked at documents but has interviewed the relevant parties in the course of her investigations, the court, looking at the matter on the papers alone, and bearing in mind the Ombudsman's own extensive expertise in matters relating to local Government, will be slow to depart from the Ombudsman's conclusions, and will do so only if it is persuaded that there is a good reason to do so. Mr Carter sought to persuade me that there were good reasons to do so based on Mrs Atkinson's two witness statements, which dispute, in certain respects, the Ombudsman's factual conclusions.

13 Before turning to Mrs Atkinson's evidence, it is convenient to deal with the outcome of the complaint that had been made by another individual to the Standards Board for England, which Mrs Atkinson prayed in aid in her case.

### The Standards Board's report

14 The report, dated 26 July 2007, contains a number of findings. For present purposes, the most relevant conclusion of the Ethical Standards Officer ("the officer") was that Councillor Simms did not have a personal interest (for the purposes of the Council's Code of Conduct ) in Mrs Atkinson's planning application as a result of their alleged friendship. At first sight, this might appear to contradict the Ombudsman's conclusions (see above), however it is important to bear two factors in mind. First, the officer expressly did not consider whether the decision on the planning application might be flawed by bias. In paragraph 4.9 of the report, he said:

> "My investigation is concerned solely with whether Councillor Simms breached the Council's Code of Conduct , and issues such as the weight to be given to planning policies play no part in my considerations. Nor do I consider whether the decision might have been flawed by bias. Those matters are outside by jurisdiction and do not influence my findings. I do not comment on them."

15 Second, when considering whether there was a friendship between Councillors Simms and Mrs Atkinson for the purposes of the Council's Code of Conduct , the officer applied the following definition of "friend" in paragraph 5.26 of his report:

> "The Code does not define a 'friend', but the Adjudication Panel for England (in the case referenced APE 0211) stated that:
>
> > 'A friend can be defined as someone well known to another and regarded with liking, affection and loyalty by that person.
> >
> > In the Tribunal's view, this definition, which requires the presence of

> four elements, does assist in drawing the line between friends, acquaintances or friendly acquaintances. Where each of the four elements is present, the Tribunal is satisfied that the relationship is such that its existence should be declared in the public interest.'"

16 In my judgment, there can be no doubt that any fair-minded observer who concluded that Mrs Atkinson was not merely a fellow Conservative Councillor, but was well-known to Councillor Simms, and that he regarded her with "liking, affection and loyalty" would conclude not merely that there was a real possibility of bias on the part of Councillor Simms, but that it was likely that there would be bias. In the spectrum of relationships between decision-takers and those who will benefit personally from their decisions, a friendly relationship as defined in paragraph 5.26 of the report, perhaps best summarised as "a close friendship", would be a compelling reason for the decision-taker to recuse him or herself. It does not follow that there will be no apparent bias if the relationship is less close, ie if one or more of the four elements referred to in paragraph 5.26 of the report is not present in the relationship between the decision-taker and the person who benefits from the decision.

17 Mr Carter accepted that there could be a finding of apparent bias even in the absence of a "friendship" as defined in the Board's report, but he relied on the officer's factual findings which he submitted were more detailed and hence more reliable than those of the Ombudsman.

18 In paragraphs 5.27-5.40, the officer concluded as follows:

> "5.27. Councillor Simms regularly drives Councillor Atkinson to and from Council meetings, a round trip of around 40 miles. Both members live in a rural area and Councillor Atkinson's house lies between Councillor Simms' home and the Council offices.
>
> 5.28. Councillor Simms' wife and Councillor Atkinson's husband are both involved in their respective parish churches as wardens. Councillor and Mrs Simms, and Councillor and Mr Atkinson share a mutual friend, Mr Rhodes.
>
> 5.29. Councillor Simms and Councillor Atkinson have known each over directly only since Councillor Atkinson became a member of the Council in 2002, and it was at this point that the mutual connections with Mr Rhodes and their partners being churchwardens came to light.
>
> 5.30. Councillor Simms and Councillor Atkinson come into contact outside Council business a couple of dozen times a year, at political, church and village social functions.
>
> 5.31. Councillor Simms and Councillor Atkinson have seen each other socially three of four times since she became a member of the Council in 2002, at large-scale local social events, often attended by hundreds of people.
>
> 5.32. Councillor Simms has visited Councillor Atkinson's house on two or three occasions since 2002, attending fundraising events, and she has never visited his house.
>
> 5.33. I am concerned by the apparent incompatibility between Councillor Simms' statement, recorded by the Ombudsman, that he and Councillor Atkinson come into contact over twenty times in a year, and Councillor Simms' and Councillor Atkinson's statement to my investigator that they have seen each other socially only three or four times in the last five years.
>
> 5.34. In my view, however, this contradiction is explained by the difference between 'coming into contact' and meeting socially. It is likely that two people living relatively close together and being members of the same local authority and political group as well as actively involved in the local community will, as a matter of course, come into contact with some frequency, even outside formal Council business, whereas meeting socially indicates a degree of friendship.
>
> 5.35. The evidence of Councillor Atkinson and Councillor Simms is largely consistent in this respect, in that both recalled only three or four occasions when they met in a social context, some of these occurring at Councillor Atkinson's home, but in all cases the events

appear to have been of relatively significant scale and not events that would be limited to a circle of friends.

5.36. I consider it to be a particularly relevant fact in this respect that Councillor Simms was not invited to Councillor and Mr Atkinson's recent event celebrating their anniversary, which involved 120 invitees.

5.37. In applying the criteria for friendship set out by the Adjudication Panel for England, I first consider whether Councillor Atkinson is well-known to Councillor Simms. In my view, a combination of factors must be considered, the length of time for which two people have known each other, the frequency of contact between them, the nature of that contact, and the extent of the knowledge each has of the other.

5.38. Councillor Simms and Councillor Atkinson have known each other for five years, and come into contact quite frequently, but the nature of that contact is only occasionally social and even then in the context of large gatherings. I do not consider that Councillor Atkinson and Councillor Simms have any particular knowledge of one another beyond that which would characterise acquaintances.

5.39. I consider that Councillor Simms does regard Councillor Atkinson with a degree of liking, as he would be unlikely to regularly share his car with someone for whom he had no liking. I do not consider however that the evidence of Councillor Simms or Councillor Atkinson indicated any particular affection between them, or loyalty beyond what would be reasonable for political colleagues.

5.40. I do not consider that the nature of the relationship between Councillor Simms and Councillor Mrs Atkinson is such as to constitute a friendship for the purposes of the code of conduct."

## Mrs Atkinson's evidence

19 In her two witness statements (the first pre-dating and the second post-dating her receipt of the Board's Report) Mrs Atkinson took issue with a number of the Ombudsman's conclusions and maintained that Councillor Simms was not a friend. He had not, for example, been among as many as 120 guests who had been invited to her and Mr Atkinson's wedding anniversary celebrations in 2007, and he had not attended the weddings of her two children, at which large numbers of guests had been present. She particularly took issue with the account apparently given by Councillor Simms to the Ombudsman's investigator of the number of occasions during the year in which they came into contact with each other (see paragraph 5.30 of the Board's report and paragraph 62 of the Ombudsman's report).

20 The officer sought to resolve the apparent discrepancy in paragraph 5.34 of the report, which for convenience I repeat:

"In my view, however, this contradiction is explained by the difference between 'coming into contact' and meeting socially. It is likely that two people living relatively close together and being members of the same local authority and political group as well as actively involved in the local community will, as a matter of course, come into contact with some frequency, even outside formal Council business, whereas meeting socially indicates a degree of friendship."

21 Mrs Atkinson gave evidence of the four social occasions at which she and Councillor Simms were present. In each of those cases, there were also large numbers of other guests present.

## Detailed submissions

22 It is common ground that the court must have regard to all of the relevant circumstances. Mr Sharland relied on eight factors in particular, which he submitted either individually or cumulatively demonstrated the existence of apparent bias. Those factors were:

- (i) Councillor Simms' membership of the same political group as Councillor Atkinson,

together with his failure to declare, contrary to the members' Code of Conduct, his personal interest arising from that membership.

- (ii) Their shared transport to and from Council meetings and site visits, including to and from the two Committee meetings that discussed Mr and Mrs Atkinson's planning application. The fact that such car sharing was done for environmental purposes was neither here nor there.
- (iii) Their social contact outside the Council. The descriptions by the Board and the Ombudsman of such contact differed somewhat, but even on the Board's analysis, they came into contact on a couple of dozen times a year.
- (iv) The various concerns that had been expressed by fellow councillors and members of the public as to their relationship.
- (v) The conflict between Councillor Simms' views and that of certain other Conservative Councillors, and the strong views of the Council's planning officers and other councillors as to the merits of the planning application. The Ombudsman had noted that the approach taken by Councillor Simms did not accord with the correct approach to be taken to such applications.
- (vi) The fact that Mrs Atkinson had copied Councillor Simms into correspondence relating to possible planning enforcement action in a letter dated 24 March 2004.
- (vii) The fact that Councillor Simms had stated that he had had "his ear bent" about the application.
- (viii) Councillor Simms' subsequent withdrawal in April 2006 from the Committee's consideration of the second planning application that had been made by Mr and Mrs Atkinson on the basis that he had a prejudicial interest in the application.

23 In response to those factors, Mr Carter submitted that, considered individually, no one factor would cause a fair-minded and informed observer to conclude that there was a real possibility that there had been bias. I readily accept that submission. This is a case in which no one factor is decisive; rather it is the overall picture presented by the cumulative impact of the factors relied upon by Mr Sharland.

24 In respect of each individual factor, adopting the numbering set out above, Mr Carter submitted that, in respect of (i), although Mrs Atkinson and Councillor Simms were members of the same political group, Councillor Simms had registered his membership of that political group. It was not in the least unusual for councillors to be members of the same political group. Mrs Atkinson's planning application had been made in her private capacity, not as a member of the group. Thus this was a factor which should be given no weight.

25 In respect of (ii) car sharing, there was a factual dispute between the Ombudsman and Mrs Atkinson. The Ombudsman had found that the shared car journeys took over 30 minutes each way. On Mrs Atkinson's evidence, the journey took 20 minutes "on a good run". I do not regard this factual difference as being of any particular significance. Mr Carter submitted that of greater significance was the purpose of the car sharing. On the evidence, the car was shared not because of any friendship between Mrs Atkinson and Councillor Simms, but in order to save money. Both of them lived in a rural area where lengthy distances were to be travelled, and only one expense claim would be made if one car was used. He further submitted that according, to Mrs Atkinson, and indeed Councillor Simms, she did not lobby him while in the car about the merits of her application. Thus, no one could consider that the fact that they shared cars was material.

26 In respect of factor (iii), as to the extent of their social contact outside the Council, I have already mentioned that Mrs Atkinson took issue with the way in which the Ombudsman depicted that contact in paragraph 62 of her report. Mr Carter drew attention to the way in which, in the Board's report, the officer drew a distinction between coming into contact and meeting socially (see paragraph 5.34 above). He also referred to Mrs Atkinson's account of the occasions on which she and Councillor Simms had been at the same social function — in each case the social function being one where there were large numbers of other persons present.

27 In respect of factor (iv), the concerns that had been expressed by councillors and members of the public, Mr Carter submitted that their views were not synonomous with the views of a fair-minded and informed observer, not least because they did not know the full range of facts which were now before the court. He also drew attention to the fact that the concerns expressed had related not simply to Councillor Simms, but also to another councillor, Councillor Ellington, about whom no complaint is made in these proceedings, and moreover, the complainants (or some of them) had formed the view that Councillor Simms and Mrs Atkinson were "close friends", a view which was not borne out when that issue was examined by the Standards Board.

28 As to issue (v), he submitted that the fact that Councillor Simms had disagreed with the views of

the planning officers was a point of no weight whatsoever. It was for councillors to form their own views, and since there had been no challenge to the validity of the planning permission, it must be assumed that the reasons for granting planning permission were reasons which were reasonably open to those councillors who voted in favour of granting permission.

29 As to issue (vi), he submitted that the mere fact of sending the letter of the 23 March 2004 to Councillor Simms did not suggest that there might be any apparent bias on his part. The letter was sent some time before the relevant decision in 2005.

30 So far as issue (vii) is concerned, the reference to Councillor Simms "having his ear bent" should be read in the light of other passages in the Ombudsman's report in which it is reported that Councillor Simms had "admitted to officers that he had had his ear bent at length about this application, although he did not say by whom" (see paragraph 36). Councillor Simms told the Ombudsman that if he had said such a thing, it would have been in relation to comments made either by the Chairman of the Parish Council or by Councillor Atkinson. He was not clear as to which, but he did say that if it was Councillor Atkinson, then she would have been bending his ear about the delay in determining her application, and there was not any discussion about the merits of the application. His recollection of events is recorded in the same way in the Board's report.

31 Lastly, in respect of issue (viii), Mr Carter submitted that Councillor Simms' withdrawal from the later decision was not probative at all; the withdrawal was made at a time when the Ombudsman was investigating the matter and could equally well be explained by the fact that Councillor Simms was simply being cautious — ultra cautious perhaps — in his dealings with the matter.

## Conclusions

32 In deciding what conclusions would be drawn by the fair-minded and informed observer, it seems to me that the starting point must be that the extent of the contact between Mrs Atkinson and Councillor Simms led not merely one aggrieved member of the public to complain to the Ombudsman, but to fellow councillors to express their concerns, and to another member of the public (or a councillor, cf. para. 61 of the Ombudsman's report and para. 1.1 of the Board's report) to complain to the Standards Board. While some of their criticisms may well have been misplaced and/or overstated, there can be little doubt that Councillor Simms' conduct at the two meetings in April and September 2005 was a cause of real concern. Thus, the Ombudsman, in reaching her conclusion that there was maladministration, could not be said to have been on some "frolic of her own". Moreover, the Council itself now acknowledges that the decision to grant planning permission was "clearly improper". Thus, this is not a case of a lone third party alleging apparent bias on the part of a local planning authority that is vigorously denying any such procedural impropriety. The Council itself concedes that there was apparent bias. Although Mr Carter submitted that little weight should be given to that conclusion because he said that the Council was concerned to avoid paying compensation if it had to make a revocation order, I do not accept that that is the sole reason why the Council has adopted the stance that it has in these proceedings. I have no doubt that it had regard to an understandable desire to avoid paying compensation in revocation proceedings, but equally, I have no doubt that it genuinely formed the view that the criticisms made by the Ombudsman were justified.

33 In these circumstances, Mr Carter would have had an up-hill task to persuade this court to disagree with the Ombudsman's judgment, reinforced by that of the decision-taking local planning authority. However, his task is made well nigh impossible by Councillor Simms' own evidence to the Board, which the officer recorded in these terms in paragraphs 4.118 and 4.119 of his report.

> "4.118. Councillor Simms stated that he had declared a prejudicial interest at the 26 April 2006 DCC meeting because a fellow member and political colleague had advised him that a member of the public might consider the friendship to be close.
>
> 4.119. Councillor Simms stated to my investigator that he had not previously considered the issue of how interests might be perceived by the public, as opposed to his own perception, but in the light of the comments his colleague, Councillor Nash, had made to him, he now considered that on that basis he may have had a prejudicial interest in Councillor Atkinson's planning application. Councillor Simms emphasised that this was on the basis of knowledge and information he did not have at the time to the 2005 meetings, but with hindsight, he considered it might have been more appropriate for him to declare a prejudicial interest at the time."

34 Councillor Simms was at pains to emphasise that he was expressing those views with the benefit of hindsight. However, as Mr Carter acknowledged, the court must consider all of the circumstances, and in so doing is able to confer the benefit of hindsight on the informed observer. There has been no evidence from Councillor Simms to contradict what he told the Board's investigator. His (albeit belated) recognition of how others would have perceived his relationship with Mrs Atkinson is, in my judgment, fatal to the interested parties' case. It must be borne in mind that Councillor Nash was not a political opponent; he was a fellow member of the Conservative Party.

35 I of course give appropriate weight to Mrs Atkinson's evidence, but the critical question is not her perception of the relationship between herself and Councillor Simms, but how Councillor Simms' relationship with her would have appeared to the fair-minded and informed observer. Whatever the arguments as to the details of the extent of the social and other contact between them, on both the Ombudsman's and the Board's findings, that contact went beyond the contact which might normally be expected between fellow councillors who were simply in the same political party. Although they were not friends, as defined by the Board, they were fairly described as "friendly acquaintances", and were plainly perceived as such by their fellow councillors, including councillors who were the political allies of Councillor Simms.

36 This was not any planning application; it was a planning application in which a councillor, who was a member of Councillor Simms' own political party, had a very obvious personal interest. Councillor Simms was not simply a member of the relevant Committee; he was its Chairman. In that capacity, he should have been only too aware of the need to avoid any appearance of bias. On the basis of the evidence that he gave to the investigator on behalf of the Standards Board, he simply failed to give any thought to that issue. When he belatedly did so, even he recognised that the public's perception of the relationship would have been such that he should have recused himself.

37 It is also relevant, as part of the surrounding circumstances, that his vote was not simply one amongst a large number of votes either in favour of or against a particular proposal, his was the casting vote. Moreover, it is of particular importance that his casting vote in favour of planning permission was a vote contrary not simply to one but to two very strong recommendations by the planning officers to refuse planning permission. I would readily accept the submission that officers recommend and members decide, but in looking at all of the circumstances of this case, it is relevant to bear in mind that the officers' recommendations that planning permission should be refused on policy grounds were expressed in very strong terms. In the officers' view, this was not a finely balanced decision. There were very clear policy objections to the proposed development.

38 Moreover, although Mr Carter submitted that, in the absence of legal challenge, it must be assumed that the reasons for granting planning permission were not Wednesbury unreasonable, any fair-minded observer, with the benefit of the facts that are now known by the court, would surely be struck by the fact that the decision of the Committee (admittedly a differently constituted Committee) when Councillor Simms recused himself was to refuse planning permission for the second application on the very policy grounds that Councillor Simms had rejected. There has been no suggestion that there was any material difference between the first and the second applications such as to justify on planning grounds the decisions to grant the first and to refuse the second.

39 In these circumstances, in my judgment, any fair-minded and informed observer would conclude that there was indeed a real possibility of bias in the decision to grant planning permission.

40 Mr Carter submitted that, even if I reached that conclusion, I should not quash the planning permission. Instead, the defendant should be left to revoke the planning permission pursuant to section 97 of the Town and Country Planning Act 1990 . The starting point, in my judgment, is that where a procedural impropriety such as apparent bias has been established, the proper approach, in principle, is to maintain the integrity of the planning system by quashing the offending planning permission. There may of course be sound reasons for not pursuing such a course. There may, for example, have been undue delay. There may, for example, be substantial prejudice. There may be other reasons why it would be appropriate not to quash a permission in such circumstances. However, the starting point should be that the permission will be quashed unless there is a good reason not to do so. In the present case, delay and prejudice are rightly not argued on behalf of the interested parties.

41 So far as the submission that the defendant should be left to revoke the permission is concerned, Mr Carter fairly acknowledged that that would impose a burden upon the public purse, but he contended that the interested parties were the innocent parties in this affair; that they had done no wrong, and therefore it was wrong to, as he put it, "impose the burden" on them.

42 It is important to understand the nature of "the burden". Quashing the planning permission will not turn a grant of planning permission into a refusal of planning permission; rather, the matter will have to be re-determined by the defendant in accordance with the law. If the proposed development is justified on the planning merits, then, no doubt, planning permission will be granted. If the interested parties receive a refusal of planning permission from the defendant, they will of course be entitled to appeal against that refusal to the Secretary of State. So quashing the planning permission will not deprive them of the opportunity of establishing, if they are able to do so, that a grant of planning permission is justified on the planning merits.

43 If, on the other hand, it is concluded, either by the defendant and/or by the Secretary of State on appeal, that planning permission is not justified on the planning merits, then I can see no good reason why the public should be required to pay the interested parties' compensation for the loss of a planning permission which, by definition, they should not have been granted.

44 For those reasons, I reject the submission that it would be appropriate not to quash the planning permission. The application for judicial review succeeds, and the planning permission is quashed.

45 MR SHARLAND: My Lord, thank you very much. I have one minor correction. I believe you referred to the Standards Board being a complaint by the public; it is actually a complaint by Councillor Stanley Beer, a member of the Council.

46 MR JUSTICE SULLIVAN: That is interesting.

47 MR SHARLAND: It is page 157, paragraph 1.1 of the Standards report where it sets it out.

48 MR JUSTICE SULLIVAN: I had got that from the Ombudsman. She talked about — I see, yes. Well, actually, at paragraph 61 she said: "... for a member of the public to make a complaint to the Standards Board and for another member of the public to make a complaint to me". So the member of the public was a councillor?

49 MR SHARLAND: Either yes, or there was a subsequent complaint by the councillor. I am not sure, but the actual complaint that the Standards Board looked at came from the councillor.

50 MR JUSTICE SULLIVAN: Thank you very much. I will deal with that in the body of the judgment.

51 MR SHARLAND: Thank you very much, my Lord. That just leaves the issue of costs. We would ask for our costs today. As this case was listed for a day and a half, neither side have produced schedules, so I would ask for detailed assessment if a figure cannot be agreed. I have spoken to my learned friend beforehand and he is content with the detailed assessment approach. He does not resist costs generally, although he seeks to resist some of the costs, and I feel it makes sense if I let him put that, and respond briefly.

52 MR JUSTICE SULLIVAN: Yes, Mr Carter?

53 MR CARTER: My Lord, I plainly cannot argue against the costs award in principle, but I would ask your Lordship to bear in mind the particular nature of these proceedings. The interested party had no involvement in making the decision. There was no pre-action protocol letter served on my clients. For obvious reasons there was no point in so doing, and plainly the claimant would not have served a pre-action protocol letter on the Council given the nature of the circumstances. That means that the application for permission to bring this judicial review claim was always going to have to be made by the claimant to the court. My clients took advantage of the opportunity given to them to put in summary grounds of resistence, but this is not one of those cases where the claimant has sought to respond to those summary grounds prior to the determination of the permission issue. My submission would be that any costs order against my clients should only run from the period after 24 July 2007, which is the date when permission was granted, because prior to that, all the work that the claimant has done would have had to have been conducted in any event, and my client has not caused any of that expense to have been incurred.

54 Your Lordship clearly has a discretion to take matters as to periods of costs into account having regard to CPR 44.3 , so I would make that submission, and as it is a matter of principle, I would submit it needs to be dealt with now rather than to be left for detail assessment.

55 MR JUSTICE SULLIVAN: Yes, effectively you are saying that had you put your hands up on receipt of the claim form, then we would have ended up with a consent order quashing the permission by consent, and it is the difference in costs, in substance, if we take the date from when Mr Bartlett granted permission. It is the difference between the costs of obtaining a written consent order, which the claimant would have had to bear, indemnified by the Council of course, and the costs of the all

singing, all dancing hearing.

56 MR CARTER: My Lord, yes.

57 MR JUSTICE SULLIVAN: What do you want to say about that, Mr Sharland?

58 MR SHARLAND: My Lord, we oppose such an approach. My learned friend mentioned pre-action protocol. If we had written one, it would just have increased costs. Clearly, the Council cannot — I do not think that takes the matter any further. Clearly we did need to issue and we would have issued anyway, but that is pretty much true for most judicial reviews. If the interested party, on receipt of the claim form, had agreed to a consent order, it is probable that no order for costs would have been made, although not inevitable. One would look at the Boxall case, and there might be argument on that issue. But they had their opportunity.

59 MR JUSTICE SULLIVAN: Costs would normally be made against the defendant, which is the Council, so —

60 MR SHARLAND: My Lord, I accept there might be some argument on that. I also accept the likely costs will be no order for costs, albeit I would say that that is not inevitable. But the interested party had an opportunity to get out of this without any costs, but they fought this tooth and nail. My Lord, I do not think that overstates the position. They put in summary grounds; they put in detail grounds; they put in two witness statements; they put in a very full skeleton argument. The interested party had their opportunity; they chose to fight it, and if they choose to fight it and lose, the consequences should be that they pick up the bill, my Lord. That is really all I have to say.

61 MR JUSTICE SULLIVAN: Thank you very much.

62 I am satisfied that the fair order in this case, bearing in mind that the fault is actually on the part of the defendant Council, is to say that the interested parties are to pay the claimant's costs after the date when permission was granted by Mr Bartlett QC. I accept Mr Sharland's submission that the interested parties at least thereafter fought the matter tooth and nail, and I am afraid they must pay for that. Until then, it does seem to me they were entitled, as bystanders effectively, to see what view the court took of the matter by way of putting in summary grounds. So that was not an unreasonable course, but thereafter they had their warning and they did not choose to take it, so they pay thereafter.

63 Any more for any more?

64 MR CARTER: No, thank you, my Lord.

65 MR SHARLAND: Thank you, my Lord.

66 MR JUSTICE SULLIVAN: Thank you both very much.