

Committee: ACCESS

Date: 26 July 2007

Report: DECISION MAKING -  
ISSUES OF PRE- DETERMINATION AND CODE OF CONDUCT

### **Purpose of this Report**

1. The purpose of this report is to advise members on their participation in the decision making process relating to Traffic Regulation Orders

### **Strategic Planning Framework**

2. The information and recommendation(s) contained in this report are consistent with the Authority's statutory purposes and its approved strategic planning framework.
- **Corporate Value :**  
Integrity: Our relationship with the public, partners and each other are built on honesty, transparency, equality, impartiality and consistency.

### **Background**

3. The Authority is expecting to receive powers to make Traffic Regulation Orders (TROs) in its own right. Commencement of section 72 of the Natural Environment and Rural Communities Act (NERC Act), which brings these powers in to being, is expected on 1 October 2007.
4. Where Members are involved in considering specific proposals for Traffic Regulation Orders, issues can arise as to whether particular Members should participate in the decision, because of their personal position. The Authority's approach to management of green lanes is one that raises great public interest and there is no doubt that persons opposing the making of TROs will, in some cases, seek to argue that participation by some Members is inappropriate. It is always possible that a legal challenge to a TRO could be mounted on the basis that the decision to make it was tainted by one or more members participating in the decision when they should not have done.
5. In considering this matter, there are 2 different issues to consider:
  - (i) Is there a problem with the legal issue of predetermination? - ie the legal principle which states that, where a person or body has to make a decision on a matter, they must not make up their minds before the proper time for the decision to be made.

- (ii) Does the member have a personal interest under the code of conduct? If so is it a prejudicial interest, and what action does the member need to take?
6. The former issue should be very familiar to members from their present (or past) involvement on the Planning Committee, but members may not appreciate that the principle doesn't just apply to Planning Committee, but to most decisions which affect people's rights.
  7. Members are also well aware of the code of conduct. Recent legislation requires the Authority to adopt a revised code of conduct by 1st October 2007. A report has been prepared by the Authority's Monitoring Officer for the Authority meeting on 31st July recommending adoption of a revised code of conduct and the advice within this report assumes that the code will be adopted in the recommended form without modification.

### **The rules on predetermination & bias**

8. The legal principle of predetermination states that, where a person or body has to make a decision on a matter, they must not make up their minds before the proper time for the decision to be made. Members are entitled to be "predisposed" to a certain point of view, but must retain an open mind on each individual case which comes before them. Any member who does not feel that they can honestly do that (and if necessary make a sworn statement afterwards, for use in court proceedings, that they approached the matter without having predetermined it) should not take part in the decision. In short, it is acceptable to think or say "I don't believe in general terms that recreational use of 4x4 vehicles on green lanes in a National Park is a good idea, but I will look at each case on its merits as and when it comes before the Access Committee". It is not acceptable to think or say: "Recreational vehicles ought to be banned from all green lanes in the National Park"; or "When this case comes to Committee, I am definitely going to vote to ban recreational vehicles".
9. Authority Members who are also members of a lobbying group or user group should consider whether they think they have an open mind, and might in some cases decide to do the opposite of what their group advocates, if they were persuaded on the merits of a particular case. If so, they should say they are a member of the relevant group and explain that despite that, they will look at each case on its merits. If not, they should take no part in the decision. Members should be aware of the views advocated by groups to which they belong, and whether they have an established position on this issue. They also need to consider their own prominence within the group, and how closely they are associated with its views. If a member is an ordinary member of a national body which supports the use of recreational vehicles on green lanes but does not particularly campaign on the issue that is very different to being president of a local body which exists specifically to campaign on the issue. There are of course many different situations between these extremes, and members should consider how their own position would be perceived by someone knowing the full picture, and whether such a person would think there was a real danger that they could be biased when considering individual cases.
10. If members are going to be involved in decisions on a particular matter in one forum (eg Access Committee) they should ensure that they do not make any statement prior

to consideration of the item in that forum which indicates that they have made up their minds. At Green Lanes Advisory Group or Parish Council level, for example, members should explain that they are members of Access Committee and therefore will not make up their minds on any particular issue until they have the full information before them at an Access Committee meeting. They may if they wish go on to express particular points, for example that some aspect of a proposal causes them concern. It is helpful if, when the time does come to make a decision at Access Committee, members who may be thought to have a predetermined view explain their position, either to the effect that:

- they have a predetermined view (or they accept that people may reasonably think this) and are therefore leaving the room without taking part in the debate, or
- that they do not have a predetermined view, and are prepared to judge each case on its own merits.

### **The Members' code of conduct**

11. In the first place, members need to consider whether they have a personal interest in each particular case coming before Access Committee – for example because they are regular users of the route in question, or it crosses land owned by themselves, or by a close associate, family member, or it relates to or affects some other body or organisation with which they are involved.
12. Members must then go on to consider whether such an interest is also prejudicial. The interest will be prejudicial if it affects the financial position of any such person or body and 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 member's judgement of the public interest.
13. Members should note that the specific exemption for farming and land interests contained in the current code of conduct for NPA members has been omitted from the new one.
14. In relation to lobby groups, it is unlikely that membership of such a group will amount to a prejudicial interest under the code. The common law principles of predetermination and bias are, however, particularly pertinent in the context of lobby groups.
15. If a member has a prejudicial interest they must leave the room taking no part in the debate and not seek improperly to influence the decision. They do, however, have the same right to attend a meeting to make representations as a member of the public. If a member chooses to exercise this right they must leave the room immediately after they have made such representations.
16. In summary the position under the code of conduct is that each member is asked to:
  - Consider whether you have a personal interest arising from your own circumstances (regular use of route, ownership by yourselves / close associate / family / organisation of which you are a member of land over which route passes etc). You are likely to have a prejudicial interest if it affects the financial position of

such a person or body and an informed member of the public would think it is likely to prejudice your judgment of the public interest.

- Consider whether you have a personal interest because you (or a family member, close associate etc) owns other land with green lanes over it: if so declare a personal interest. You are unlikely to have a prejudicial interest.
- Consider whether you are a member of any group which lobbies or campaigns on the issues. If so, declare a personal interest. You are unlikely to have a prejudicial interest.

## **Conclusion**

17. This report is intended to give general advice on when members should or should not participate in decision making in respect of TROs. Failure to comply with the principles of pre determination or to adhere to the Code of Conduct may render the Authority's decision susceptible to Judicial Review and / or the individual member at risk of a complaint in respect of a breach of the Code of Conduct.

## **RECOMMENDATION**

18. That the report be noted.

**Clare Bevan**  
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28 June 2007

Background papers:  
None