Agenda Item 11

Chichester District Council

CORPORATE GOVERNANCE AND AUDIT COMMITTEE 30 June 2011

The Localism Bill – The Future Of Standards

Contacts

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Introduction

1 This report, which has already been considered by the Standards Committee at its meeting on Monday 6 June 2011, details the provisions of the Localism Bill concerning standards in local authorities in England and Wales with specific reference to Chichester. The report has been updated to include in paras 6 to 8 below the Standards Committee's initial views on the future for the standards regime at Chichester District Council. The Standards Committee was requested to express its initial views for the information of the Corporate Governance and Audit Committee and to help guide the debate further in Chichester over the coming months.

2 The much-trailed Localism Bill was published in December 2010. It is a significant document 'for the local authority with implications for many different areas of the Council's work and legal responsibilities. This report however focuses on the implications the Bill will have, subject to enactment and change through the legislative process, to standards in local government. Included in the report is the related area of pre-determination. Much of what is in the Bill has been raised previously in speeches and press releases and there are very few surprises in the drafting. However like much modern legislation while some of the more fundamental issues are addressed in the primary instrument much has been reserved for secondary legislation, which at the time of writing has yet to be published. However despite considerable pre-warning of what was to come the reforms suggested can still be fairly said to be radical in nature and how some at least will work in practice remains a matter of conjecture.

Summary of the Provisions

3 There are complex transitional arrangements included in the Bill designed to take us from the current position to the new regime.

A It is proposed that there will be an appointed day (probably two months after the Bill has received royal assent - currently being indicated to take place at the end of the calendar year so the appointed day may be in February 2012) after which no further complaints under the old regime can be made.

B At the appointed day any cases in the system (that is that have not been concluded) will still be dealt with although any cases referred to the Standards Board for England will automatically go back to the local authority that referred them and they must conclude matters. The Standards Committee in its current statutory form will remain in place until all outstanding cases have been dealt with. Those cases that straddle the regimes will not however have any right of appeal and the Standards Committee will not have the power to suspend and must limit themselves to for example the issuing of a censure or request that training is undergone.

There will also be some interesting issues raised by complaints made just before the changes are made with monitoring officers placed in the invidious position of being obliged to pursue complaints in a system which is about to be abolished. Further the cases that are to be referred back to authorities from Standards for England will (as otherwise they would not have been referred in the first place to Standards for England) be the more serious and high profile ones and they will need to be dealt with locally. That might prove problematic especially in a system which may by that time have lost much of its current authority.

4 The most significant proposed changes in the Bill are as follows:

A Members are not to be said to have had a closed mind when making a decision just because they had previously done anything that directly or indirectly indicated what view the decision maker took or would or might take in relation to that matter and the matter was relevant to the decision. It will be interesting to see what the courts will make of this provision albeit that recent decisions on similar issues have begun to more obviously recognise the difference between say a judge and a councillor and the role that local politics and campaigning play in the process. The high water mark, given this proposed provision, seems to have been Persimmon Homes case - *R (Lewis) v Redcar and Cleveland Borough Council and Persimmon Homes Teeside Limited* [2008] EWCA Civ 746.

In this case the Court of Appeal allowed an appeal by Persimmon against the judgment of Jackson J ([2007] EWHC 3166 (Admin)) by which he quashed a planning permission for a large mixed-use development at Coatham Enclosure Redcar.

The Court of Appeal gave detailed consideration as to what is the proper test to apply which it is alleged that a decision maker appears to have closed mind or predetermination.

Pill LJ said (underlining supplied):

There is no doubt that Councillors who have a personal interest, as defined in the authorities, must not participate in Council decisions. No question of personal interest arises in this case. The Committee which granted planning permission consisted of elected members who would be entitled, and indeed expected, to have, and to have expressed, views <u>on planning issues</u>. When taking a decision Councillors must have regard to material considerations and only to material considerations, and to <u>give fair consideration to points raised</u>, whether in an Officer's report to them or in representations made to them at a meeting of the Planning Committee. Sufficient attention to the

contents of the proposal, which on occasions will involve consideration of detail, must be given. They are not, however, required to cast aside views on planning policy they will have formed when seeking election or when acting as Councillors. The test is a very different one from that to be applied to those in a judicial or quasi-judicial position.

Councillors are elected to implement, amongst other things, planning policies. They can properly take part in the debates which lead to planning applications made by the Council itself. It is common ground that in the case of some applications they are likely to have, and are entitled to have, a disposition in favour of granting permission. It is possible to infer a closed mind, or the real risk a mind was closed, from the circumstances and evidence. Given the role of Councillors, clear pointers are, in my view, required if that state of mind is to be held to have become a closed, or apparently closed, mind at the time of decision.

Central to such a consideration, however, must be a recognition that Councillors are not in a judicial or quasi-judicial position but are elected to provide and pursue policies. Members of a Planning Committee would be entitled, and indeed expected, to have and to have expressed views on planning issues…

This proposed new provision however arguably goes further and allows members to be extremely clear as to their position on say a specific forthcoming planning permission. The issue must be would this allow a member to campaign on a "vote for me and I will vote against this planning application whatever the applicants might say" get elected and on a planning committee and then vote against? If so this may be seen as a significant shift in the perception of the local planning system where the political side of the equation which whilst always present was subservient to an almost but not actual judicial approach or at least a position where a closed mind was not acceptable. It will be interesting to see what for example the property development industry makes of this suggestion.

In a letter to all council leaders the Minister for Housing and Local Government mentioned this provision but said in addition:

of course councillors will still need to be open minded at the point of decision in the sense of listening to all the arguments and weighing them against their preferred outcome, before actually voting.

However it is not clear from the Bill how this requirement is built into the provision or how you can be open minded when you have a preferred outcome.

B Local authorities will have a duty to promote and maintain standards of conduct by Members and co-opted members. As will be seen how this is to be achieved will be very much a matter of local choice. It should be noted that whenever there is a duty, the council "must", then that is something which is ultimately enforceable by the courts. It is not immediately apparent in what context this may become subject of litigation although lawyers have shown themselves adept at applying such obligations in other areas for example discrimination law. One might see that a judicial review of say a

planning application could include such a call to the local authority as to how it may or may not have sought to comply with this duty in the context perhaps of bad behaviour in the committee. It will also be seen that without a code of conduct concepts such as “high standards of conduct” may be more difficult to define.

C The new provisions, like the old, are not to be functions of the Cabinet. Standards issues will therefore need to continue to be dealt with by a committee of the Council (although not necessarily a standards committee as such) rather than the Cabinet.

D Councils may adopt a code of conduct for members. A council may revise its existing code, adopt one to replace the existing one, or withdraw its existing one without replacing it - and therefore not have a code at all. The Council can publicise this in whatever way it wishes. This decision must be taken by full Council. This will, in direct contrast to the previous regime which allowed only very minimal variation to the codes, with much being compulsory, allow for significant variation between councils. It is too early to know where authorities generally will position themselves on this issue although it is anticipated that many will suggest a new code be adopted. It is probably unlikely that all authorities will universally take this up.

E If a council has adopted a code of conduct then if written allegations are made that a member has failed or (perhaps oddly) may fail to comply with it then the council must consider whether or not to investigate it and decide how to investigate it. It is clear therefore that the decision to have a code does potentially have resource implications as the current reading of this provision is that without a code there can be no complaints which carry a legal obligation. Without a regime of any sort councils may find themselves, in the face of a determined complainant, obliged to deal with the matter via their internal complaints system or at least seeking some sort of process rather than simply saying there is nowhere for the complainant to take matters. One route may be via the political groups. It is clear and perhaps welcome however that it will (compared to the previous complex and obligatory legislative provisions) be a matter for the Council how it seeks to investigate such matters should it adopt a code. A far more light touch (previously a possible four committee meetings could be required for one complaint) procedure can be put into place albeit that officers will recommend that the Council does agree a procedure formally.

F The legislation allows the Secretary of State to make regulations requiring the monitoring officer to establish and maintain a register of interests. The regulations may include details of what sort of matter needs to be registered, provisions requiring the disclosure and possible withdrawal of Members with those interests, and powers to grant dispensations to those members so they can, despite the interest, participate. The regulations may also include some details of sanctions the Council can impose on members who fail to comply (but not suspension or disqualification) and the requirement to make the register available and telling the public that it is available. It is worth noting that there will be a power in the legislation to the Secretary of State to make regulations and of itself does not impose anything upon members. It would allow a similar regime to that which currently exists although, and it is

suspected that this would be widely welcomed, that the current complex system of personal and prejudicial interests could be simplified.

G One of the surprising clauses in the Bill is that a failure to comply with the provisions with regard to interests regarding registering interests, disclosing them, or taking part when they should not (should such provisions be introduced) "without reasonable excuse" will be a criminal offence. This will attract a fine of up to level 5 being currently £5000.00. The court (and now it will only be the court) can then disqualify the member for up to five years. Only the Director of Public Prosecutions (DPP) can authorise and bring a prosecution for an offence under these provisions. Therefore the Council itself could not prosecute one of its own members unless they were authorised to do so upon behalf of the DPP.

H The Bill also has provisions for the much-heralded abolition of the Standards Board for England.

Future of Standards in Chichester

5 There are going to be some significant decisions to make by Chichester in relation to both this committee and how it will comply with its duty to promote standards.

The decisions include:

A Whether to have a code of conduct at all.

B If it has a code, what form that will take and whether it will seek to adopt provisions that are either the same or similar to those being adopted elsewhere.

C What sort of procedure to have for the investigation of complaints, which parts to delegate to officers either alone or in consultation with members, and which parts to delegate to a sub-committee.

D What role it sees for the Standards Committee in respect of which it will no longer have a legal obligation to establish but nonetheless will have existing and ongoing powers to form and maintain.

E If it has a code, whether it is likely (taken together with the provisions coming into force for registering interests) that the range of sanctions open to the Council will be defined and what sanctions it may seek to impose for other breaches of the code. These look as if they will be limited to matters such as censure and perhaps the withdrawal of resources but not say suspension.

Initial Views of the Standards Committee

6 The Standards Committee considered this report at its meeting on Monday 6 June 2011. It discussed the implications of the proposals contained in the Localism Bill if enacted for the future of standards in Chichester District. Members expressed their views both generally and specifically with reference to issues A to E in para 5 above. Members noted the report and resolved that its views should be reported to the Corporate Governance and Audit Committee at its next meeting. A summary of the discussion and the views expressed appears in paras 7 and 8 below.

7 The Standards Committee expressed grave concerns in particular about:

(a) the vacuum that would be created by the abolition of the existing standards regime and

(b) the casting adrift of parish councils and those who wished to complain against their members, leaving complainants with few and expensive remedies eg judicial review and parish councils to contend largely unaided with persistent, even vexatious complainants.

The Code of Conduct itself was in many ways a suitable, even admirable document. However, undeniably the process for the local assessment of complaints had proved to be cumbersome, bureaucratic and costly in several respects (as some of the cases considered by the Council's sub-committees had demonstrated). The answer to this was not, however, to abandon the control of standards to local choice or whim. It was essential for elected members to be very clear about their individual responsibilities and without such a standards framework, which was a long-held practice both in local government and in many other organisations, there would be an unmanageable situation with regard to upholding standards of conduct. It was also pointed out that irrespective of any code of conduct complaints procedure, local residents who were dissatisfied with their parish councillors could always seek to stand against them at the next parish council election.

8 With regard to the decisions that would need to be made regarding the future standards regime at Chichester District Council as set out at A to E in para 5 above, the Standards Committee expressed the following initial views:

(a) Chichester District Council should have a code of conduct after the Localism Bill had been enacted.

(b) The replacement code could be the existing statutory Code of Conduct. If at all possible it was desirable to achieve consistency with codes of conduct used by other local authorities.

(c) It was not sensible or possible at this stage to express detailed views on the procedure for the investigation of complaints. Other than the obvious need to achieve simplicity of process, this must await the provisions of the primary and secondary legislation and associated guidance published by the government.

(d) It would be strongly advantageous in the post-abolition era for standards committees to continue to have independent members, who should have full, equal voting rights, as they did at present, alongside their district and parish council colleagues.

(e) Sanctions should not consist solely of censure, which would be wholly inadequate and bring any system for the local investigation of complaints into disrepute. It would have little or no effect on a recalcitrant offender and would fail to deal with a range of issues and situations for which a more robust sanction would be required. It was unclear what other sanctions would be available to voluntary standards committees, but at the very least there should be the option of withdrawing for a period of time resources from and/or the payment of allowances to a member in breach of the code of conduct.

Appendices

9.1 E-mail from the Local Government Association to the Chief Executive dated 16 February 2011

9.2 Briefing paper by the Local Government Group and the Association of Council Secretaries and Solicitors: *Maintaining High Ethical Standards in Local Government*