

**REPLY BY THE PRESIDENT OF THE DEVELOPMENT & PLANNING AUTHORITY
TO A QUESTION ASKED PURSUANT TO RULE 14 OF THE
RULES OF PROCEDURE BY DEPUTY LESTER QUERIPEL**

Question

Dear Deputy Tindall.

As you are aware, two of your Development and Planning Authority Board members, namely Deputy Paint and myself, have recused ourselves from sitting as members of the panel at the forthcoming Open Plan Meeting to decide whether the planning applications to extend St Sampsons and Les Beaucamp High Schools are supported or not. Deputy Paint and I recused ourselves on the grounds that we have both voted against the Education, Sport and Culture proposals to introduce a 'one school across two sites' model for secondary education here in Guernsey, on two separate occasions during previous States debates (January 2018 and September 2019), therefore we are now conflicted. Seeing as the remaining three members of the Board, namely Deputy Oliver, Alderney Representative Snowdon and your good self, have also voted on the proposals (you all voted in favour of the proposals as I'm sure you will recall: please see Footnote below), then you must also all now be conflicted, just like Deputy Paint and myself, hence my submitting this question to you.

Before I submit the question however, I feel it's important for me to elaborate on the point I made in the previous paragraph regarding all of the Board members of the D&PA being conflicted, which I will now do.

When the Assembly were asked to vote on the ESC proposals during both of the aforementioned States debates, they weren't just being asked to vote on a new policy for secondary school education being introduced here in the island, they were being asked to vote on a whole 'package': which included two of our current High schools being extended. Consequently, every member of the Assembly voted on the proposals knowing full well that extending those two schools would have a major impact on our community and also on our environment. i.e: the future increase in the volume of traffic in the immediate areas surrounding the schools being just one issue the Assembly needed to take into consideration whilst deciding which way to vote.

Therefore, my question to you is as follows:

How can you justify Deputy Oliver, Alderney Representative Snowdon and yourself, sitting as members of the panel at the aforementioned Open Plan Meeting, seeing as you are all conflicted?

Footnote:

Voting record for the previous States debates:

January 2018:

Deputy Tindall: In favour.

Deputy Oliver: In favour.

Deputy Paint: Against.

Deputy Lester Queripel: Against.

September 2019:

Deputy Tindall: In favour.

Deputy Oliver: Absent.

Alderney Representative Snowdon: In favour.

Deputy Paint: Against.

Deputy Lester Queripel: Against.

In closing, I would remind you of what is stated in the Development and Planning Authority Legal Briefing on Planning and Open Planning Meetings Presentation Notes-1st June 2016. Bullet point 3 under section 6, headed 'Avoiding conflicts of interest' reads as follows:

'Very important to step out of decision making process if there is any potential for bias or perception of bias'.

Most sincerely.

Deputy Lester Queripel.

Answer

In order to assist a member of the Development & Planning Authority on whether or not they should recuse themselves from any particular planning decision, the Propriety Guidance for Members of the Authority is the main source of reference. This Guidance was last updated by the Authority in 2016. It draws on principles relating to English local authority councillors who sit on local authority planning committees in England which is analogous to the position of Guernsey deputies who are D&PA Members.

As there is no directly relevant Guernsey case law on the matter, the Guernsey courts are likely to have regard to the English case law. The English courts have sought to recognise that councillors have a different role from court judges or Tribunal members so that there must be some leeway for them to both determine planning applications and fulfil their roles as elected, political representatives involved in policy formulation.

The Guidance identifies that the main legal risks that may arise from the way in which the D&PA conducts, or appears to conduct, itself are -

- a. actual or apparent bias, or
- b. pre-determination i.e. the D&PA, or a member, has not properly applied itself/themselves to considering all relevant planning considerations or has considered irrelevant considerations and has pre-determined the decision irrespective of the merits of arguments put to the D&PA; such a pre-determination can also arise because of a bias towards a particular view.

The courts have sought to distinguish between situations which involve predetermination of an application or bias on the one hand and predisposition on the other. The former is indicative of a 'closed mind' approach and likely to leave the Committee's decision susceptible to challenge by Judicial Review. Clearly expressing an intention to vote in a particular way before a meeting on a planning application (predetermination) is different from where a Member makes it clear they are willing to listen to all the considerations presented to the committee before deciding on how to vote on the application (predisposition). The latter is alright, the former is not and may result in a Court quashing such planning decisions.

In this case, the decision on the planning applications is distinct from the prior higher level policy decision which has been twice before the States. The policy decision related to a project which did not go into the detailed material planning considerations relevant to a planning application and was also prior to any planning application being submitted. As a result, voting on both occasions on this decision has not automatically meant any member of the D&PA was required to recuse themselves for that reason alone. In fact, prior to the lodging of the Rule 11 questions to the Committee *for* Education, Sport & Culture in the States on the 15th January 2020, it was understood that all members of the D&PA were not "conflicted" in the relevant sense of not having pre-determined the applications and did not need to recuse themselves. However, when the draft D&PA statement of response for the States' meeting when those questions were to be asked was discussed by the Committee, Deputies Lester Queripel and Paint advised that they had pre-determined to refuse any planning application relating to the school sites irrespective of whether the applications did or did not adhere to planning policies or a consideration having regard to all other material planning considerations. That pre-determination has, therefore, meant they were required to recuse themselves which they did.

At that time, Deputy Tindall, Deputy Oliver and Alderney Representative Snowdon all confirmed that they were open minded in respect of the planning applications for the two current school sites and would await all the material evidence before making a decision. They were, therefore, considered not to be "conflicted" and, provided they do not change their view, they will be able to determine the planning applications. At the time of writing this Rule 14 answer, Deputy Tindall, Deputy Oliver and Alderney Representative Snowdon confirm that they remain open minded.

In accordance with the statement made by the Bailiff on the 15th January 2020 in the States Meeting, the majority of the D&PA have not participated in or commented on matters relating to the planning applications for the school site. This will continue to be the case, however, further to legal advice on the matter, it can be confirmed that the D&PA members may vote on the Requête and any amendments thereto having regard to the content of the particular propositions put to the States and provided that they remain open-minded and determine the planning applications on the basis of the material planning considerations. The right forum for that is at an Open Planning Meeting.

Date of Receipt of the Question: 7 February 2020

Date of Reply: 26 February 2020