

Councillors Legal Liabilities and Obligations

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1. Introduction

It has been suggested by council staff in the past that councillors (particularly executive members) may have personal liability for any decisions they may make in respect of traffic calming schemes. For example it has been argued that they might incur liability if accidents subsequently happened at locations covered by decisions they had taken. This presumably could be on two grounds: a) that the decision might be “ultra vires” and lead to a surcharge being imposed; or b) that members of the public might sue them (as was argued when Brian Coleman removed humps in Barnet when it was suggested that anyone involved in a subsequent accident should sue him for “causing” the accident).

In addition it has also been suggested by council staff that if councillors failed to follow the advice, and specific recommendations of officers, that they would also probably be financially liable for any consequences or might otherwise incur liability or breach the law.

This note is intended to examine these propositions, and present the true legal position.

2. The Roles of Councillors and Officers

Councillors in the form of the main council assembly act as a body to decide relevant policies and agree on actions. Local authorities are corporate bodies comprising councillors and the executive, the latter being made up of council officers (ie. the staff of the local authority) who are supposed to advise councillors and implement their decisions.

To quote “Knowles on Local Authority Meetings”, an authoritative work on the workings of local authorities: “*Local Authorities, as corporate bodies, are separate and distinct from the persons who comprise an authority for the time being; and this means that individual councillors are not personally liable for the consequences of what is done in good faith and lawfully by the local authority*”. Incidentally the position of council officers is somewhat different, but “*statutory provisions provide immunity against personal liability for both members and officers*”.

Note that where a Local Authority takes decisions in Committees, or decisions are taken by “Executive Members” who have taken over the role of committees in executive councils, then the main council has effectively delegated some of its powers to those committees or members. That does not change the legality or enforceability of those decisions. However clearly the main body of the council as represented by a meeting of all members can set overriding policies, or review any delegated decisions.

3. The “Wednesbury Principle”

If a decision by a body of members is not to be challenged in the courts as unreasonable and “ultra vires”, for example by application for a judicial review, then it must comply with criteria laid down in the case *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation (1948)*. This laid down the principle that the local authority must not take into account matters that it should not take into account, and must not neglect matters which it should take into account. If it has done the above, then the court can only interfere if the resulting decision was so unreasonable that no reasonable authority would ever take it.

Clearly therefore council officers need to present all the facts that are relevant, including the results of any public consultations, to members before they make a decision.

In addition any decision taken must not be “ultra vires” in the sense that it is outside the local authorities jurisdiction. However, in reality local authorities have very wide powers - for example under s.111 of LGA 1972, local authorities have power to do anything (whether or not involving expenditure...) calculated to facilitate or be conducive or incidental to the discharge of any of their functions. Clearly London Boroughs such as Bromley have been given powers to maintain the local road network and to perform any necessary traffic engineering works that they consider necessary. For example, under Section 62 of the Highways Act 1980 they have general powers of “improvement” of highways, and specifically they have powers for the “*construction, maintenance and removal of road humps*” (the key point is underlined). In respect of traffic calming measures any work may include “*build-outs, chicanes, gateways, islands, overrun areas, pinch-points, or rumble devices or any combination of such works*” and can also include “*lighting; paving, grass or other covering; pillars, bollards, planters, walls, rails or fences; objects or structures spanning the highway; or trees shrubs or other plants*” so as enhance the work, promote safety or improve the environment (see the Highways Traffic Calming Regulations 1999 No. 1026). As you can see, the Highways Acts and any specific regulations are drawn very broadly in any case.

The net outcome of the above points is that if the decision of any members is not totally unreasonable, and they have considered all the relevant information before making a considered decision, then it is very unlikely to be challengeable in the courts. The only obligation of a member is to consider all the information available to him before making a decision.

Note that there is no justification for the argument that members have to adhere to the recommendations of officers when making any such decision, so long as they do not totally ignore what is communicated to them. Indeed clearly, even in Bromley council, there have been occasions when members chose to take a different view on a matter to council officers, and that is likely to be the case in future. The fact that such decisions may be related to road safety, and hence may affect the safety of individuals, is irrelevant as clearly many decisions taken by councillors affect the safety and well being of members of the public, either directly or indirectly. There is however one exception to the above in relation to advice by the chief financial officer or the authority’s monitoring office in relation to unlawful expenditure (see para. 7 below).

The author is not suggesting that councillors should make a habit of ignoring the advice of council staff. The former are often of short standing, whereas the latter have more professional training and experience in local authority business. But in the case for example of the use of speed humps, where the evidence of benefits and disadvantages is unclear, the data is often contradictory and the scientific studies are sparse, it basically comes down to a matter of opinion or judgement, and such issues are often better determined by politicians or by democratic consultation of local residents. Recommendations by officers to members are a matter of administrative convenience to expedite the normal business of a council and have no particular standing in law.

However there is one example where councillors would be unwise indeed to ignore the professional advice of council staff and that is in the planning area. Unless there are good grounds in planning law to justify rejection of a planning application, then councillors on a planning committee would be rash indeed to reject it. If they do the applicant will simply appeal to a planning inspector and the council are likely to incur costs in futilely defending their position.

Note also that councillors are not restricted from taking advice purely from council staff. They can obtain independent advice if they consider it necessary, or if they are dissatisfied

with the advice of officers. Indeed they can co-opt independent members of the public to speak at any council meetings if necessary, although such persons cannot vote.

4. Blanket Resolutions on Policy

Members have wide ranging discretion to adopt general policies which may influence or dictate operational decisions or act as guidance to officers. But there is a general principle which was established by such cases as *R v. Port of London Authority ex parte Kynoch (1919)* that a local authority must not adopt policies that are so rigid that they preclude proper consideration of the merits or otherwise of individual questions. It is for this reason why Bromley council adopted a “preference for non-vertical deflection traffic calming devices” rather than a “no more speed humps” policy.

5. Variation of Decisions

Members may subsequently vary or rescind decisions so far as is practicable and lawful. It is therefore clearly wrong to suggest for example, that once a traffic calming scheme has been approved and even installed, that it cannot be subsequently varied or removed if there are good reasons to do so (there was of course the past example in Bromley of removing a traffic calming scheme in Crofton Lane, Orpington which consisted of “horizontal deflections” and was considered to be unsafe after experience of its use).

6. Personal Liability for Decisions

As mentioned above, members usually do not have personal liability for the decisions they take. In fact the *Local Government (Miscellaneous Provisions) Act 1976 s. 39* clearly indicates that they have an indemnity against any such liability and that the local authority themselves would take responsibility for any such liability.

However there are a few circumstances where a council member, or officer, can incur such liability. For example, if a member votes on a matter in which he has a personal financial interest then he may incur a penalty. Members may also incur a liability if they are present at a meeting, which discusses any proposed expenditure which is contrary to law, and they don't vote against the proposals.

It was of course the expenditure on an “ultra vires” proposal which caused Dame Shirley Porter to be “surcharged” with a massive penalty (recently agreed at £12 million) because in her case council funds were being applied to “gerrymandering” in essence, and not for a lawful purpose.

However, to suggest that expenditure of funds, say to remove speed humps, would be an “unlawful” purpose is clearly misconceived.

7. Model Code of Conduct

So as to make it clear on what matters councillors need to be wary, and which expenditures are unlawful, the Government have established and published a “Model Code of Conduct (see *The Local Authorities (Model Code of Conduct)(England) Order 2001*) which you can find on the internet. This makes it clear that members must also have regard to relevant advice from the authority's chief finance officer and the authority's “monitoring officer” in relation to personal or prejudicial interests and of any contraventions of law or suspected “maladministration”.

8. Suing the Council

A highway authority has a common law duty of care to all road users to act to eradicate a known danger, and it has an absolute duty under the Highways Act 1980 to keep roads in a good state of repair so that they are safe for ordinary traffic. However, there is wide discretion given to the authority. For example, in a recent judgement in the House of Lords, it was decided in a case where an accident had occurred due to inadequate gritting in icy weather that the duty was only to maintain the road in a passable and physically non dangerous condition. In other words, it does not relieve the road user from the need to take reasonable care and attention when using the road. Another key case was *Stovin v Wise* where it was concluded that there was no obligation for an authority to act on an off-road obstructions that might be a danger to traffic (not totally irrelevant to Old Hill, Chislehurst for example, where many of the possible problems are caused by building developments which have access points onto the road which are concealed by trees and other off-road obstructions).

For similar reasons, it is almost impossible to pursue legal action against a local authority for personal injury or damage to vehicles caused by driving over a speed hump (and there have been many such cases) because speed humps are specifically permitted by the relevant Highways Regulations and one would have to probably show that the local authority acted unreasonably and did not take reasonable care to light or signpost them.

It has been suggested that the Human Rights Act 1998, which embodies the obligations under the European Convention on Human Rights, may be more helpful to litigants. For example there is a clear obligation under the Act for public bodies (such as Local Authorities) to protect human life. In other words, they must take reasonable steps to avoid danger to life in areas for which they are responsible. Unfortunately there is hardly any case law that shows how this right would be interpreted in practice in the UK courts and there are many legal difficulties in applying it to road safety issues. There is also the issue of what is practical and reasonable - for example, clearly closure of a road would prevent all accidents on it, but it is unlikely that any court would rule that it was an obligation of a Local Authority to close roads because of such risks in all circumstances.

To take the case where someone might claim that the removal of a speed hump was the direct cause of a subsequent accident, clearly there is the difficulty that the Local Authority is hardly likely to be directly responsible for the cause of the accident. The burden of proof would be very onerous because there would need to be evidence that the accident or injury would not have occurred if road users were acting reasonably when the speed hump had been removed. So for example, if alternative road safety measures had been installed, or there were adequate warning signs, or there was no evidence of excessive road accidents before the humps were installed, then such a case would probably fail. In the case of Old Hill, Chislehurst for example, it is not clear that the accidents were previously excessive or exceptional. Also in the example of Old Hill, the humps that are being complained of do not even meet with Government recommendations as to dimensions so it could hardly be considered unreasonable for the council to remove them.

Another contrary argument that could also be used would be that the presence of humps actually caused other deaths due to delays to emergency services (as was argued by Brian Coleman in Barnet), and therefore it was reasonable to remove the humps. Also clearly the removal of a hump is hardly likely to be the direct cause of a road traffic accident, as it is likely to be mainly assigned to the actions or omissions of one or more road users. The fact that a reduction in traffic speed might minimise any subsequent injury, hardly provides grounds for suing the council rather than the other road user. In addition of course, the Highways Act 1980 specifically permits a local authority to remove humps, as pointed out

above. Needless to say, the writer was unable to find any similar case or legal precedent that would support such a legal action.

In my view it is exceedingly unlikely that any such claim would be upheld in a court of law. In reality, local highway authorities quite frequently perform traffic engineering works which result in dangerous road layouts, but there appear to be no cases of them being sued by people involved in subsequent accidents. It would be rather like trying to sue the council for the presence of a bend in the road which may have caused a driver to leave the road in icy weather. Claiming the road authority should not build roads containing bends would not likely get one very far. The most probable result would be the judge would assign 100% of the blame to the driver.

Note also that no such liability in any event could be assigned to any elected members involved in decisions related to such road engineering.

9. Conclusion

I hope that this note has made clear the following points:

- a) The chance of any personal liability being incurred by councillors (whether executive members or otherwise) is very low and would only apply in very specific circumstances which are well known and clearly specified in law (and are almost certainly irrelevant to the variation, installation or removal of traffic calming devices unless there is common pecuniary interest between the road contractor and council members or officers).
- b) Councillors do not have to slavishly follow the advice of council officers and clearly have the discretion to discard such advice and use their own judgement so long as they are not totally unreasonable. In fact I would argue that it would be undermining the democratic functions of a local authority if councillors did not have discretion to make up their own minds. However, they should clearly take note of such advice and must not avoid reading it.
- c) Any variation of any traffic engineering scheme should clearly take account of the general duty of care to road users and again if the local authority is seen to act reasonably then it has wide discretion on specific issues.