Clerks ruling regarding a planning application

In the light of the decision to call an extraordinary meeting of council on Tuesday 1st May 2018 the following questions or issues have been raised; this ruling represents an attempt to answer those issues.

1. **Why is this application being considered by council not the planning committee?**
    a. In consultation with the mayor, the Town Clerk concluded that there were good reasons for convening an extraordinary meeting of council. On a technical basis, because of the issue of some councillors being council appointed trustees of the Freemen Trust, the committee was likely to be inquorate. The problem was exacerbated because there was no time for council to grant a dispensation, which some members might wish to apply for to enable them to take part in the discussion or to vote on the matter.
    b. The scale and significance of the application meant that it was appropriate to enable the widest possible debate, which it was felt a council meeting would make possible. It is likely, in order to enable a full debate and consultation, that council will be invited to suspend its own standing orders to allow a separate session of public speaking on this application, with a different set of time limits to those normally enforced at the beginning of meetings. Such a variation of standing orders is not a matter to be taken lightly and again is a matter more suited to full council than a planning committee.

2. **Members interests**
    a. <u>General explanation</u>
    Council has the power, under S.17 of its Code of Conduct, to grant a dispensation to members who have an interest in a topic for discussion so that they may take part in the debate and vote where otherwise they could not. S.17 says *"On a written request made to the Council's clerk, the Council may grant a member a dispensation to participate in a discussion and vote on a matter at a meeting even if he/she has an interest in Appendices A and B if the Council believes that:*
    a. the number of members otherwise prohibited from taking part in the meeting would impede the transaction of the business
    b. it is in the interests of the inhabitants in the Council's area to allow the member to take part or
    c. it is otherwise appropriate to grant a dispensation."
    Forms for making a written request for dispensation will be available before the meeting tomorrow evening and will also be circulated to elected members today. The form will ask members which form of interest they believe they have in the matter at hand, and for that reason we are setting out below the categories of interest which we believe arise.

    b. <u>Elected members who are council appointed Trustees of the Freemen Trust</u>
    Under the Code of Conduct adopted by Berwick upon Tweed Town Council this is an Appendix B(i) interest; S.13 of the Code provides *"Where a matter arises at a meeting which relates to an interest in Appendix B, the member:*

a. shall declare what his/her interest is Code of Conduct adopted at Council Meeting 090712
b. may speak on the matter only if members of the public are also allowed to speak at the meeting
c. shall not vote on the matter."
Members who have this interest who are wishing to apply for a dispensation to allow them to vote on this matter should cite 'Appendix B(i) as the type of interest on the form.

c. <u>Councillors who are members of the Guild of Freemen</u>
Under the Code of Conduct adopted by Berwick upon Tweed Town Council this is an Appendix B(ii)b interest. As above, members would be allowed to speak, if the public are allowed to speak, but not to vote, unless they seek a dispensation. Members who have this interest who are wishing to apply for a dispensation to allow them to vote on this matter should cite 'Appendix B(i) as the type of interest on the form.

d. <u>Councillors who as individuals derive an income from the Guild of Freemen</u>
We do not pretend to understand the basis on which the distribution of income by the Guild of Freemen is calculated, but our advice is that any elected member who receives or expects to receive an income from the Guild has beneficial interest in land that constitutes a disclosable pecuniary interest under Appendix A of the code of conduct, and should withdraw from the meeting when this matter is being considered. Members who have this interest who are wishing to apply for a dispensation to allow them to vote on this matter should cite 'Appendix A, beneficial interest in land' as the type of interest on the form and should ensure that the interest in question is also recorded on their declaration of interests form within 28 days of the meeting.

e. <u>Are there other concerns, such as whether the LGA / PAS document on Probity in Planning, updated in 2013 applies to this matter</u>?
One elector, who is also a member of the Neighbourhood Plan Steering Group, has used this document, and its guidelines, to argue that a dispensation should not be granted, and that those elected members who are Freemen Trustees should not take part in the consideration of this matter. We rejected this argument for the following reasons;
    i. The document cited was produced as guidance for Planning Authorities, not local councils, (which by definition are not Planning Authorities) and as such is not authoritative for local councils.
    ii. Our advice is guided by specific sources, such as the relevant legislation, and by cases decided more recently than the document in question. For instance, in the case of R vs Flower, reported at Appendix B of this ruling, it was made clear that the offence could have been avoided if the accused had sought advice, or a dispensation, as provided for by the Localism Act. As is set out in the article at Appendix C, we would strongly argue that whilst there may be an interest in planning authorities having a more specific code for those elected members involved in making planning decisions, such a degree of bureaucratic complexity is not

necessary for a local council that is only a statutory consultee on planning matters.

iii. In summary, our view is that the document cited is at best a secondary source, produced by a body not relevant to the local council sector, and has been superceded by decided case law.

3. Councillors who live near, own or occupy land near the proposed development.
Attached at Appendix C is an article by Paul Hoey, with whom some of you will be familiar, setting out his view that the definition of interests as laid down in the Localism Act is significantly narrower than many councillors perceive them to be. It is a view that, as your Town Clerk, I share. Your predecessors adopted a code of conduct that is entirely lawful, but which does not extend beyond the very strict set of definitions provided by the law and common practice. My advice would remain, as it has been on a number of occasions, that members should ask themselves, when considering if they have a special interest in a matter that goes beyond those laid down in the code, if a reasonable person would perceive their interest to be so much greater than that experienced by the general residents of Berwick, in which case they should seek further advice, and disclose it to the meeting. If councillor cannot isolate a specific reason why their interest is so much greater than the interest in a matter experienced by the general residents of Berwick, then they almost certainly do not have one.

4. Is this an application in which council has a corporate interest?
The topic of whether council has a corporate interest is raised by some residents. Their reasoning, as best we understand it, is that because council derives a portion of its income from the Freemen Trust, so it has an interest in this application. It is a seductive argument, but it is my view, as Town Clerk, that the interest is too remote, and too unclear, for it the be a persuasive argument.
It is useful to rehearse here the advice that the Town Clerk gives to Trustees appointed to the Freemen Trust by council. The Trust has some charitable activities, and is primarily to be regard as if it were, in all its activities, the income generating arm of a charity. As such Trustees appointed by the Town Council are under a fiduciary duty to take proper advice from the advisors to the trust, and to act in the interests of the trust, not of the Town Council, and should put the interests of the Town Council entirely out of mind when acting as Trustees. Conversely, when acting as Town Councillors, they should set aside entirely the interests of the Trust, and serve on the interests of the Town Council.
The Town Council derives a portion of its income from the Freemen, but that income is based not on the success or failure of individual transactions but on the annual accounts of the Trust. It is impossible for the Town Council to discern if this transaction will cause an increase of decrease in its income from the Trust; indeed, your current clerk is on record as having expressed his frustration at the difficulties the unknown levels of income from the Trust place upon financial planning. However, it does merit saying that if any member believes that this application will bring an increased income to the Town Council, and that this is an argument in its favour, they should set that consideration aside when considering this planning application, and should only view it, on its own merits, as a planning application.

Appendix A

The Relevant Authorities (Disclosable Pecuniary Interests) Regulations 2012

Made

6th June 2012

Laid before Parliament

8th June 2012

Coming into force

1st July 2012

The Secretary of State, in exercise of the powers conferred by sections 30(3) and 235(2) of the Localism Act 2011(**1**), makes the following Regulations.

Citation, commencement and interpretation

1.—(1) These Regulations may be cited as the Relevant Authorities (Disclosable Pecuniary Interests) Regulations 2012 and shall come into force on 1st July 2012.

(2) In these regulations—

"the Act" means the Localism Act 2011;

"body in which the relevant person has a beneficial interest" means a firm in which the relevant person is a partner or a body corporate of which the relevant person is a director, or in the securities of which the relevant person has a beneficial interest;

"director" includes a member of the committee of management of an industrial and provident society;

"land" excludes an easement, servitude, interest or right in or over land which does not carry with it a right for the relevant person (alone or jointly with another) to occupy the land or to receive income;

"M" means a member of a relevant authority;

“member” includes a co-opted member;

“relevant authority” means the authority of which M is a member;

“relevant period” means the period of 12 months ending with the day on which M gives a notification for the purposes of section 30(1) or section 31(7), as the case may be, of the Act;

“relevant person” means M or any other person referred to in section 30(3)(b) of the Act;

“securities” means shares, debentures, debenture stock, loan stock, bonds, units of a collective investment scheme within the meaning of the Financial Services and Markets Act 2000(**2**) and other securities of any description, other than money deposited with a building society.

Specified pecuniary interests

2. The pecuniary interests which are specified for the purposes of Chapter 7 of Part 1 of the Act are the interests specified in the second column of the Schedule to these Regulations.

Signed by authority of the Secretary of State for Communities and Local Government

Grant Shapps
Minister of State
Department for Communities and Local Government

6th June 2012

Regulation 2

SCHEDULE

Subject	*Prescribed description*
Employment, office, trade, profession or vocation	Any employment, office, trade, profession or vocation carried on for profit or gain.
Sponsorship	Any payment or provision of any other financial benefit (other than from the relevant authority) made or provided within the relevant period in respect of any expenses incurred by M in carrying out duties as a member, or towards the election expenses of M. This includes any payment or financial benefit from a trade union within the meaning of the

	Trade Union and Labour Relations (Consolidation) Act 1992(**3**).
Contracts	Any contract which is made between the relevant person (or a body in which the relevant person has a beneficial interest) and the relevant authority— (a) under which goods or services are to be provided or works are to be executed; and (b) which has not been fully discharged.
Land	Any beneficial interest in land which is within the area of the relevant authority.
Licences	Any licence (alone or jointly with others) to occupy land in the area of the relevant authority for a month or longer.
Corporate tenancies	Any tenancy where (to M's knowledge)— (a) the landlord is the relevant authority; and (b) the tenant is a body in which the relevant person has a beneficial interest.

Securities	Any beneficial interest in securities of a body where— (a) that body (to M's knowledge) has a place of business or land in the area of the relevant authority; and (b) either— (i) the total nominal value of the securities exceeds £25,000 or one hundredth of the total issued share capital of that body; or (ii) if the share capital of that body is of more than one class, the total nominal value of the shares of any one class in which the relevant person has a beneficial interest exceeds one hundredth of the total issued share capital of that class.

EXPLANATORY NOTE
(This note is not part of the Regulations)

Section 30 of the Localism Act 2011 provides that a member or co-opted member of a relevant authority as defined in section 27(6) of the Localism Act 2011, on taking office and in the circumstances set out in section 31, must notify the authority's monitoring officer of any disclosable pecuniary interest which that person has at the time of notification. These Regulations specify what is a pecuniary interest. Section 30(3) of the Act sets out the circumstances in which such an interest is a disclosable interest.

Appendix B

Councillor first to be convicted of Localism Act pecuniary interest offence

http://www.localgovernmentlawyer.co.uk/index.php?option=com_content&view=article&id=22458:councillor-first-to-be-convicted-of-localism-act-pecuniary-interest-offence&catid=56:litigation-articles (Wednesday, 01 April 2015 10:35)

A former leader of Dorset County Council is thought to have become the first councillor to be found guilty of an offence under the pecuniary interest provisions of the Localism Act 2011.
The charge against Spencer Flower, who is also a councillor at East Dorset District Council, was that on 25 February 2013 at Dorset, he was present at a meeting about the East Dorset Core Strategy and had a disclosable pecuniary interest in a matter considered at that meeting and without reasonable excuse, participated in the vote taken at that meeting.

At the time Flower was a non-executive director of Synergy Housing, a charity that exists to provide homes for those in need. He held that role from 2004 until 24 September 2013.
Although not paid a salary, he received remuneration payments of £29,920 for the years 2010 to 2013. Flower listed this interest in pecuniary interests forms submitted to East Dorset and the county council in July 2012.

The defendant pleaded not guilty to one requisition under sections 31 (1) and (4) and 34 (1) (b) and (3) of the 2011 Act. Two other charges against him had been dropped.
At Bournemouth Magistrates' Court District Judge Nicholls noted that the defendant was a man of good character and the court had received a number of character references from people speaking highly of his abilities, his conscientiousness and his years of public service.

Flower's view was that the matters at the relevant meeting in relation to the Core Strategy were of a broader nature and did not concern detailed issues of planning and ownership.
The judge nevertheless concluded that the defendant should – prior to the meeting – have taken time to consider his position.

The 2011 Act made it clear that having declared his interest in Synergy Housing, the defendant could not take part in that meeting, the judge said.
Flower could have obtained a dispensation, he added, and had previously made use of such a dispensation in relation to council tax.
District Judge Nicholls suggested that it would not have been unreasonable for the defendant to have consulted the monitoring officer. The onus remained on the member to deal with matters.

The judge found that Flower was prevented by the Localism Act from taking part in the meeting on 25 February 2013. Without a dispensation, he could not take part.

The meeting, District Judge Nicholls noted, was to consider the Core Strategy. Synergy had responded to the consultation, owned land (Cuthbury Close in Wimborne*) that was being considered and was a part of the details contained in the Core Strategy.

Flower had previously attended a meeting of Synergy where the long-term use of the land at Cuthbury Close had been discussed. It was not a reasonable excuse to effectively fail to consider those matters in the defendant's knowledge, the judge said.

It was incorrect to assert, as the defendant had done, that the Core Strategy had no relevance to the pecuniary matters considered at a meeting as set out in paragraph 31 of the 2011 Act. The defendant was under a positive duty under s. 31 (4) not to participate and not to vote, the judge said.

District Judge Nicholls said that whilst Flower's participation in the 25 February 2013 meeting could not on the evidence before the court lead to any direct benefit to him, the 2011 Act made it clear he should not take part or vote at that meeting. The defendant had failed to satisfy the court that what he did amounted to a reasonable excuse.

Flower was given a six-month conditional discharge and ordered to pay £930 in costs.
After the hearing, he told the BBC: "I am surprised and disappointed that the court has found for the prosecution this morning on a technicality.

"The decision was a conditional discharge for six months - the lowest possible penalty.
"The court emphasised the total lack of any personal gain or intent on my part."
Detective Inspector Neil Devoto of Dorset Police said: "This was a meticulous and impartial investigation into allegations under section 31 and 34 of the Localism Act 2011 following a referral from the East Dorset District Council (EDDC) Monitoring Officer. The Localism Act 2011 is relatively new and I believe that this is one of the first offences brought to trial under this legislation.

"Dorset Police is duty bound to consider evidence and investigate all allegations of criminality. In conjunction with the CPS a decision was made to bring charges. It was decided that charging

Mr Flower was in the public interest. It is important that the public have confidence in local representatives and local politics and can trust that due process takes place."

A Dorset County Council spokesman said: "The county council requires the highest standards of probity and compliance from its members, and takes such matters extremely seriously.
"The Localism Act 2011 protects communities and individuals. It ensures that the work we do is transparent and is in the best interest of Dorset residents. "The court has allowed Cllr Flower to remain an elected member and he can continue as a valued member of the county council."

* The prosecution asserted that the terms of a deal between Synergy and a local building firm meant the charity's flats in Cuthbury Close would be demolished and open up better development opportunities for the firm at the Cuthbury site. The building firm would then provide Synergy with replacement modern housing units at Cuthbury Allotments.

Appendix C

Disclosable pecuniary interests – what did the Government intend to capture?

http://www.localgovernmentlawyer.co.uk/index.php?option=com_content&view=article&id=13299:disclosable-pecuniary-interests-what-did-the-government-intend-to-capture&catid=59:governance-a-risk-articles (Tuesday, 19 February 2013 18:11)

Paul Hoey examines the limited circumstances in which the Government intended disclosable pecuniary interests to arise and explains what this means for monitoring officers.

There has been much discussion lately of whether councillors need a dispensation to take part in setting the council tax because of the rules on disclosable pecuniary interests. Much of this discussion has unfortunately been unhelpful, driven as it has been by intemperate language from politicians on the one hand about 'goldplating' and necessarily defensive reputation-protection on the other hand from monitoring officers.

This article looks at what the Government's intentions were when they legislated for disclosable pecuniary interests, whether the legislation as drafted in fact achieves their purpose and what this means for monitoring officers when it comes to ensuring propriety of decision-making.

Firstly the bare facts. For an interest to be a 'disclosable pecuniary interest' (DPI) it must be an interest which falls into one of the categories set out in regulations. If it is not covered by one of those categories, then it is not a 'DPI'. Hence, Brandon Lewis's most recent pronouncement that "being a council taxpayer is not a DPI" is quite accurate as that is not one of the categories in the regulations – though I'm not aware anyone had ever argued that it was; the debate had been about whether having property in the area (which is a category of DPI) gave you a 'DPI' in setting a property tax.

If a councillor (or his or her partner) has a DPI, they must do two things. They must register that interest – straightforward enough. And if they "have a DPI in any matter to be considered" they must not take part in the discussion or vote on the matter without a dispensation. It is this wording which leads to the confusion. What does "having a DPI in any matter" mean?

I will return to look at what the Government thinks what it means in a moment but as background to that consideration, I think you need to consider the consequences of 'having a DPI' to help reflect on the intention.

If you have a DPI and you fail to register it or you participate in a meeting without dispensation, then under the Localism Act you have committed a criminal offence. In getting rid of the old national administrative penalties, the Government's policy from the outset was to replace them with a narrower criminal penalty. Hence, crude press releases such as "in future corrupt councillors will go to jail not to a quango". In introducing this offence, Ministers stressed that their policy was not to force councillors to have to declare interests in a large number of matters as they believed the old system did, but to capture by the offence those very few councillors who might deliberately abuse public office for their own financial benefit. It was thus only ever intended to cover a very narrow range of interests.

However, Ministerial policy intention and legal drafting do not always make happy bedfellows. Does the odd phrasing "having a DPI in a matter" adequately capture the narrowness of the intention? Under the old Code, people had got used to qualifying phrases about interests such as "relates to or is likely to affect", "to a greater extent than the majority of inhabitants", "a reasonable person". None of these qualifying phrases were kept – rather it is simply now a bald statement. Hence the argument about how wide or narrow it really is.
As a further pointer to the Government's intention that it was only ever meant to capture a narrow range of interests, we can also look at the 'guidance' issued by DCLG last summer to help members understand the new rules. This is of course not statutory guidance nor is it a legal opinion, so you put on it what weight you choose.

However, in that document the Government did decide to qualify the bald legislative statement. It said you must not participate "if you have a DPI relating to any business" to be considered. So the Government view here is that the DPI must relate to the business. This seems to take us further forward as to their intent.

The previous Code had talked about a matter "relating to or affecting" your interest. The Government is now saying, to be a DPI, the business has to relate to, not merely affect, your DPI. So, a much narrower test. This is a more sensible phrasing than simply "having a DPI in the matter" - it makes it clear the Government had in mind that something must be directly about the thing, rather than just affecting it.

To illustrate the difference, let us look at four different type of planning issues. Firstly, a planning application made by the councillor themselves, about their own property. On a practical and public interest level it is hard to argue that the councillor doesn't have some sort of financial

interest in the outcome of that planning application. And taking part in discussion and voting through your own planning application goes against all principles of effective governance. It must be clear this is meant to be a DPI. And, to use the words of the DCLG guide the matter clearly relates to your registered interest – that is ownership of 1 Acacia Avenue. So we can safely say the Government intended this to be caught by the offence and we believe it is indeed. However, what if it is not the councillor's planning application but instead is his or her next door neighbour's? Again it is hard to argue that any reasonable member of the public would think it right somebody should be able to participate in a decision which so clearly affects them and their property. But note the wording I've used – affects their property. I think the Government did not intend to capture this as a DPI and their guide indicates that was not their intention. Whether the word 'in' in the legislation sufficiently conveys this is of course open to argument.

My third example is something local but not next door. For example, there may be plans to turn a house one hundred metres down the street from the councillor's house into a bail hostel. As with the second example, most people would think the councillor would have their judgement clouded by their proximity to the development and the potentially controversial nature, but it fails the Government's intended DPI test still more than the property next door. So again, this was not intended to be a DPI.

My final example is something more wide in its effect - the classic example of a supermarket development in a town. If you take a wide view of DPIs there is an argument that if a councillor lives in a neighbourhood where such a development is taking place they have an interest to declare, as there is some effect on their interest, even if remotely. However, most people would think it quite appropriate that a local councillor should be able to take part in matters which affect their community significantly. Hence, the tests added to the 2007 Code to remove these doubts – "affected more than majority" and "reasonable member of the public". One argument has been that the removal of these tests by the Government back to the bald statement "a DPI in any matter" has captured these as an interest once again as it has an effect, however remotely, on one of the councillor's registered interests. But this was clearly not the Government's intention and nor would it be a sensible policy to disallow democratic participation to such an extent at pains of a criminal offence. This example is of course analogous to the council tax position.

So, we think the Government only intended to capture one of the four examples above as a DPI. The wording of the legislation doesn't help them achieve this purpose but we do believe this was nevertheless their intent – hence their frustration when they see DPIs being stretched so that example number four is covered when they only wanted to cover number one.

But what does all this mean for monitoring officers? Well, I want you to forget about DPIs and think about the public interest. Most people accept that the chances of rafts of prosecutions for non-declaration of DPIs is quite remote – and the more distant the interest the more remote that possibility seems - but that does not mean to say you should ignore the wider issues. Dispensations are ultimately a safe but bureaucratic way of removing any doubt or any theoretical risk of prosecution. But it seems a longwinded way of reaching a simple result. And what would the point of capturing the fourth example be if it is always going to get a dispensation come what may?

Of the four examples quoted above, most reasonable people would argue that in two, if not three, of the four examples the councillor should not be taking part. The third example has of course more subtlety because there are more factors to weigh up but there is clearly some sort of line to be drawn between two and four as to what is and isn't acceptable in terms of participation or voting. The DPI provisions don't do it, nor do we believe were they intended to. They either capture only number one or all four depending on how far you are willing to interpret the legislation and policy intent.

Certainly when we train councillors on understanding their local codes and put these scenarios in front of them, there is universal acceptance that participation in one, two or three would be unacceptable. Indeed, our experience is that members are often more cautious, and certainly more sensitive to public perception, than the allegedly "over-cautious monitoring officers".
So when we explain to them that only number one is certainly caught by the new provisions and it is our view that numbers two and three aren't (or at least weren't intended to be) they look alarmed. That is because they clearly believe it is not right for members to participate in those circumstances. Sometimes we are able to say don't worry, your council has 'goldplated' your code (and remember it is the council not the MO who adopts the code) and you do have to declare these other interests under your code, albeit they do not carry the criminal sanction so are local matters. Sometimes we have to say well yes you have partly captured these but your rules still allow you to vote. But all agree they shouldn't so we look back at the underlying principles and conclude that such behaviour would not uphold the principles of selflessness, integrity or objectivity and therefore, in spite of what their code says, they should not vote on the issue. And sometimes they have not added anything beyond the DPIs in which case we have a longer discussion about the key principles and also consider matters such as a councillor's son's planning application which would not be caught anywhere.

So what I am concluding is that, in the understandable desire to understand what a DPI is in the absence of any authoritative statutory guidance or caselaw, sight has been lost of the underlying principles of public life. DPIs were only intended to be a specific narrow range of interests, underpinned by a criminal sanction. By seeking to stretch them to the point where their application and potential sanction become ridiculous risks forgetting the public interest and setting up needless antagonism. Instead more thought needs to be given to the way your council itself regulates 'other' interests. The law clearly saw local codes as being able to include interests which were not DPIs, but saw them as more minor matters to be determined locally. The Government only ever intended DPIs to arise in very limited circumstances for, as they saw it, the more serious matters. It is up to councils themselves to decide where other lines are drawn but all our experience tells us most councillors know where the public interest lies and it is wider than DPIs. It is therefore a matter for the local authority, not the DPI test, to determine where you and your councillors see the public interest line should be drawn when it comes to declaring interests.