



# Good Governance Grab

## PRE-APPREHENSION (OR AVOIDING BEING 'WINKY- POPPED')

The VLGA is hearing frequently from councillors that they are being warned not to comment on forthcoming issues, particularly planning issues, because they are risking being perceived as having made up their mind in advance of formal consideration of the issue – that is, exhibiting pre-apprehension.

You may all remember the Winky Pop case of 2007, when the Supreme Court ruled that a councillor who had made an individual submission on a planning amendment had demonstrated, through having made the submission, that he had made up his mind in advance of the formal consideration process and therefore had not been open to persuasion otherwise through formal consideration of the matter.

The VLGA takes pre-apprehension seriously. Councils have a quasi-judicial role as the local planning authority. It is natural justice and a long established legal principle that those who will determine a matter should not demonstrate in advance of the case that they have already made up their mind about it.

However councillors also have a community representative role and their constituents expect them to make comments about current and forthcoming issues.

How can these two, sometimes conflicting, roles be managed?

For councillors it means some restriction on their capacity to make public statements in their role as community representatives. They cannot be saying things which suggest they have already made up their mind about, for example, a planning issue, and that their view is fixed and cannot be changed by the actual content of the planning application and the advice they will receive.

It does not mean that councillors cannot publicly comment on a forthcoming planning issue. But you need to carefully watch your language and its meaning.

You should not say things which suggest that your mind is already closed on an issue. Nor, for that matter, should your mind be closed before you have all the information and advice which is available to you. Even if you have a previous or current public stance on the issue, you must indicate that while you have a view, you are capable of being persuaded to change this view by the information you will receive as part of the formal consideration of the application.

<b>WORDS YOU SHOULD NOT USE</b>	<b>WORDS TO CONSIDER USING</b>
Over my dead body will there be a McDonalds on this site.	My current view is that it is hard to justify a McDonalds on that site, but I will need to consider the actual application before finally making up my mind.
The community and I will not let this go ahead.	I am aware of strong community feeling about this matter and this will need to be considered as part of the decision.
I won't vote for anything which will increase traffic and urban density.	I am concerned about increased traffic and urban density. I will try and ensure that the Council's policies are strong in these areas.

This is a discipline you will need to accept if you want to be able to express a view on planning issues but also want local governments to continue to play the role they do in the planning process.

Administrations do need to advise councillors about pre-apprehension. This advice needs to focus specifically on helping councillors avoid any perception that they have irrevocably made up their minds about an issue which is yet to be considered by the Council, particularly a planning application. It should not be used to try to prevent councillors making any comments on any issues yet to be considered by the Council.

Councillors' roles as representatives of their communities require them to make comments on issues and administrations need to support this role but help councillors not stray into the danger area of pre-apprehension.

Administrations can also support councillors to avoid perceptions of pre-apprehension by ensuring that there are good decision-making processes in place during which all the relevant information is made available to councillors. This includes quality council reports, briefing sessions which enable councillors to come to grips with the relevant policy issues, appropriate consultation processes and open, transparent and well conducted council meetings. Councillors can point to their participation in good decision-making processes to demonstrate that, notwithstanding they may have had a prior view on a matter, they have exposed themselves to all the arguments and information before finally putting their hand up to vote.

The issue of pre-apprehension is one in which councillors' roles as community representatives and being part of a quasi-judicial process can come into conflict. Both councillors and administrations need to be careful in management and advice on these functions to help them to be carried out as well as possible.

**Please contact us at the VLGA on 03 9349 7999 if you have any queries about this or related governance issues.**