
COMMITTEE	Council
DATE	15 th March, 2017
DIRECTOR	Richard Ellis
TITLE OF REPORT	Councillors' Code of Conduct – Consultation on Provisions of Conflicts of Interest
REPORT NUMBER	CG/17
CHECKLIST COMPLETED	Yes

1. PURPOSE OF REPORT

The report recommends that a response is submitted to consultation being undertaken by the Scottish Government on possible amendments to the provisions on conflicts of interest in the Councillors' Code of Conduct.

2. RECOMMENDATION(S)

That Council approves the appended response to consultation, to be submitted by 20th March, 2017.

3. FINANCIAL IMPLICATIONS

There are none.

4. OTHER IMPLICATIONS

This matter links to issues of transparency and openness in decision making, as well as natural justice, as will be expanded upon below.

5. BACKGROUND/MAIN ISSUES

- 5.1 The Scottish Government is consulting on whether changes should be made to the Councillors' Code of Conduct in relation to declarations of interest on quasi judicial or regulatory matters. As it now stands, the Code of Conduct requires a councillor to declare an interest in a matter and not take part in discussion or decision making where the objective test cannot be met, ie a member of the public who knew of the councillor's interest would reasonably regard that interest as being so significant that it would prejudice the councillor's discussion and decision making.

- 5.2 Paragraph 5.7 of the Code provides that, notwithstanding the general provisions on declarations of interest, there is no need for a councillor to leave a meeting after declaring their interest where a general or specific exclusion applies. Some specific exclusions apply to certain outside bodies, however, they do not apply in respect of quasi judicial or regulatory matters where the body to which the councillor has been appointed is (i) applying for a licence, consent or approval, (ii) is making an objection or representation, (iii) has a material interest in such a licence, consent or approval, or (iv) is the subject of a statutory order of a regulatory nature, made, or proposed to be made, by the local authority.
- 5.3 As an example of the issue being consulted upon, the Scottish Government has used the example of Nestrans, the Regional Transport Partnership for North East Scotland comprising four elected members of this Council, four of Aberdeenshire Council and four external members appointed by the Scottish Government. This Council, on behalf of Nestrans, had requested that the Standards Commission grants a dispensation to allow its councillors on Nestrans to be permitted to consider matters of a quasi judicial nature in which Nestrans had an interest. The interest was that Nestrans had commented on a major planning application which had transport implications before the Council considered it. Nestrans Council members already have the option of using a specific exclusion which allows them to consider and determine matters at Council and its committees, but this does not extend to quasi judicial and regulatory matters.
- 5.4 The Standards Commission refused this Council's request as it felt that to do so would be contrary to the Code as the declarable interest would be the councillors' membership of Nestrans. Therefore, the conflict of interest, and the requirement that the councillors did not participate in consideration and determination of the matter at Planning Committee, could not be avoided by the members simply not taking part in the meeting when the matter was before Nestrans.
- 5.5 The document goes on to explain that Nestrans, this Council and Aberdeenshire Council have argued that this may adversely affect the ability of partnership bodies such as Nestrans to influence Council decisions on important issues; for example, most major planning applications would have potential transport implications. Also, it may be difficult to find members to sit on certain outside bodies as members would be more likely to wish to be able to determine planning applications than be a member of an outside body which may comment on them. This may lead to certain outside bodies being unable to properly perform their functions or to comply with statutory requirements for membership. The Standards Commission having concluded that it was not minded to grant dispensations in such cases, the Scottish Government determined that the matter can only be addressed by changing the Code of Conduct.

- 5.6 Accordingly, the proposal is to amend the Code so that councillors who are appointed to an outside body would not be prevented from taking part in their authority's consideration of a quasi judicial or regulatory matter in which that outside body had an interest, purely because of their membership of that body.
- 5.7 The Scottish Government has suggested that this could be accomplished by extending the current specific exclusion in the Code for councillor members of a public body, to include quasi judicial or regulatory matters in which that body had an interest. Members would still need to declare their interest as a member of that body. However, the Scottish Government is open to other suggestions.
- 5.8 Although raised by Nestrans as a specific issue affecting Regional Transport Partnerships, the consultation document acknowledges that this could arise in respect of other public bodies, and so views have been invited on whether any change should cover all public bodies to which councillors may be appointed.
- 5.9 The consultation also invites comment on whether any extension to the Code should apply in all cases, or only to cases where the councillor did not participate in the outside body's consideration of the quasi judicial or regulatory matter in question or attended any meeting of the body at which it was discussed. This latter example is in accordance with the specific exclusion currently in place in the Code for councillors who are members of the Cairngorms National Park Authority.
- 5.10 In considering the Council's response, it is worth reminding members of the existing categories of specific exclusion. There are four categories of specific exclusion for councillors appointed as members or directors of outside bodies who have registered the appointment as an interest, where that body is:
- (a) a devolved public body under schedule 3 to the Ethical Standards in Public Life etc (Scotland) Act 2000;
 - (b) a public body under statute;
 - (c) a body with whom there is an agreement in force which has been made in terms of section 19 of the Enterprise and New Towns (Scotland) Act 1990 by Scottish Enterprise or Highlands and Islands Enterprise for the discharge of functions of SE or HIE; and
 - (d) a company established wholly or mainly for the purpose of providing services to the councillor's local authority and which has entered into a contractual arrangement with the local authority for the supply of goods and/or services to the local authority.
- In each case, the councillor must declare the interest but can remain and consider and determine the matter in question, as long as it is not of a quasi judicial or regulatory nature. The councillor is also expected to apply the objective test and so can decide not to make use of the specific exclusion, even though it is available to them.
- 5.11 As referred to above, the Code of Conduct has a specific exclusion for members of the Cairngorms National Park Authority (CPNA). This applies where councillors who are members of the Authority can

consider and vote on planning applications at Council, committee or sub committee meetings where the CNPA has submitted comments to the Council, or has decided not to call-in an application, as long as the councillor did not take part in the relevant decision by the CNPA and did not attend the relevant CNPA meeting to decide on comments, representations or objections. It also only applies in questions of call-in where the CNPA has not discussed the merits of an application in deciding not to exercise that power.

- 5.12 In the specific Nestrans case which led to the request for a dispensation, the councillors sitting as Nestrans members had a material interest in the matter in front of them given that Nestrans had established the Strategic Transport Fund, which was being challenged. (category (iii) as set out in paragraph 5.2 above; the CNPA specific exclusion allows them to consider matters covered in (ii) in paragraph 5.2).
- 5.13 Councillors are being appointed to joint bodies more and more frequently – recent examples include the IJB, ALEOs, LLPs, the City Region Deal Joint Committee, etc. The issue of conflict of interest will become more prevalent; members must not merely comply with the Code of Conduct but also be seen to comply with natural justice. In respect of planning applications, this clearly pertains to questions of bias, perceived bias and pre determination. Any change to the Code must comply with the law, although the CNPA specific exclusion does appear to be a grey area, potentially. Having said that, the decision on whether or not to use the specific exclusion rests, in each case, with the individual member. There are occasions when a member's individual personal interests may not be compatible with the use of the exclusion, as the Guidance on the Code of Conduct suggests.
- 5.14 There are a number of questions to be addressed and various possible solutions. Firstly, which elements of quasi and judicial matters should apply. It is suggested that only parts (ii) and (iii) of the four set out in paragraph 5.2 above should, so there should be no specific exclusion where a councillor is a member of a body which is making an application or is subject to an order or regulation. If parts (ii) and (iii) are to apply on the same terms as the specific exclusion available to councillors on the CNPA, then the actual members who wish to vote on the matter at Council should not be present or take part at the meeting of the outside body.
- 5.15 Secondly, to which bodies should the proposed amendment to the Code apply? In addition to Regional Transport Partnerships, there are other bodies to which the Council makes appointments which may comment on planning applications, such as the NHS, heritage bodies, etc. Although a specific exclusion applies to some of these, there is no exclusion similar to that available to members of the CNPA and now being proposed for Nestrans and other RTPs. This would see RTPs dealt with in a different manner to other bodies. In addition, members on the City Region Deal Joint Committee, and members of ONE, were granted a dispensation recently by the Standards Commission which

meant that they could consider and vote on matters referred to Council from those bodies, having declared their interest.

- 5.16 Were the CNPA model to be adopted, it would mean that members could absent themselves from a meeting of Nestrans and so protect their ability to consider the matter before Nestrans at the appropriate Council meeting. However, were all members of both Councils to absent themselves then only the external members of Nestrans would remain. This could make Nestrans inquorate as, in terms of the Parliamentary Order which established its composition, a quarter of members require to be present for a meeting to be quorate. It is therefore proposed that the Council's response suggest that the quorum of Regional Transport Partnerships should be addressed to resolve this issue.
- 5.17 Another option would be to delegate the making of any response to officers of the body in question. This would mean that the role of members was diminished, but would provide a separation between members and the response or representation to the Council. Alternatively, authority could be delegated to the Standards Commission to add organisations to the list of devolved public bodies under Schedule 3 of the 2000 Act. This would merely extend the list of bodies to which the specific exclusion applied; it would exclude quasi judicial and regulatory matters and so would not provide for the additional ability given to members appointed to the CNPA to consider certain planning applications at their own Council.
- 5.18 These issues are summarised in the appended draft response which is presented for approval and which should be sent to the Scottish Government by 20th March, 2017.
- 5.19 Nestrans has already agreed its position, and would like to councillors who sit on Regional Transport Partnerships to be able to consider and determine the submission of representations on quasi judicial and regulatory matters at Partnership meetings, and be able to determine them when they were before Council as well. This only applies to the making of representations – were Nestrans to be in the position of submitting an application or objection, its members accept that there would be a clear conflict of interest.

6. IMPACT

Improving Customer Experience –

The consultation on changing the Councillors' Code of Conduct may appear to have little impact on service to customers, but it could resolve situations which have restricted the ability of experienced local members to consider planning matters of concern to their constituents. On that basis, local accountability should also be improved.

Improving Staff Experience –

The proposed change will have little impact on staff though it may reduce the need to seek the advice of the Standards Commission on occasion.

Improving our use of Resources –

The proposal will have limited impact on the use of resources, the question is more one of local accountability and efficiency and transparency in decision making.

Corporate -

This matter is one which was raised with the Standards Commission in the first instance by Aberdeen City and Aberdeenshire Councils, although the question is one that could be applied equally to Councils throughout Scotland. It relates to amending the Councillors' Code of Conduct, and so links to the Smarter Governance aspects of Aberdeen – the Smarter City.

Public –

The report addresses a proposal to change the national Councillors' Code of Conduct, and it may be of public interest given that the issue which ultimately initiated the proposal related to the Strategic Transport Fund, a matter which is still in the news. In general terms, the proposal could be described as one which seeks to balance the role of members as representatives of their constituencies against transparency and openness in decision making.

7. MANAGEMENT OF RISK

As described in the paragraph above, the proposed change to the Code seeks to balance members' ability to represent their communities against the need for openness and transparency in decision making. There is a requirement to avoid bias, perceived bias and the predetermination of planning applications, and even though the proposal put forward is that currently available to councillors sitting on the CNPA, it does not diminish the risk of perceived bias entirely and the Guidance on the Councillors' Code of Conduct makes it clear that members are expected to apply the objective test in each case before using a specific exclusion.

8. BACKGROUND PAPERS

Counsel's opinion x2
Correspondence with the Standards Commission

9. REPORT AUTHOR DETAILS

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