

11 FEBRUARY 2010

CONSULTATION ON PROPOSALS TO AMEND THE COUNCILLORS' CODE OF CONDUCT

1. SUMMARY

- 1.1 This report sets out comments on the proposals by the Scottish Government to amend the Councillors Code of Conduct with responses due by 18 February 2010.

2. RECOMMENDATIONS

- 2.1 To agree the terms of the response detailed in Appendix A.

3. DETAIL

- 3.1 The Government has published a consultation paper with proposals to amend the Councillors Code of Conduct. This consultation paper is at Appendix B which highlights the areas of proposed change denoted in shaded blocks. The primary impetus for the review has been the introduction of the Planning (Scotland) Act 2006 and the impact on decision making in planning matters. The emphasis of the review is consequently on chapter 7 of the code. The review addresses, in particular, the changes that needed to be made to chapter 7 and to make such amendments to other parts of the code as are deemed to be necessary. So there is little substantive change in the Code and in many cases where changes have been proposed often these are to bring the Code into line with decisions by the Standards Commission that have been made over the last number of years since the Code was first introduced. In addition to seeking to deal with the new planning arrangements the proposals clarify that the key principles of the Code should be used for guidance and interpretation only. This is a welcome clarification and reflects Standards Commission developing thinking over the last few years which has moved away from the original thinking that a complaint might be that a Councillor had breached a principle in the code. The clarification is that there must be a breach of a substantive provision in the Code for a complaint to be sustained in the future.
- 3.2 The Council is invited to consider the attached commentary at Appendix B as a basis for a Council response to the Scottish Government. Clearly since the Code applies to Councillors individually there is nothing to prevent Councillors submitting their own comments on an individual basis to the Government.

4 CONCLUSION

- 4.1 In summary, while the adjustments to the Code are generally welcome a number of concerns are highlighted. One example is around a Councillors right to engage with the community on planning applications. The protection now being provided in that part of the Code will be welcomed by Councillors but they should take care when availing themselves of the protection of that part of the Code of Conduct by remembering there could also be a scrutiny perhaps by the Court in the event of a judicial review challenge to assess whether a quasi judicial decision dealt with a matter objectively and fairly.
- 4.2 An area of the Code considered not to have been addressed in the review is the role of members appointed by Councils to partnerships or other external bodies not currently encompassed under the dispensations granted by the Standards Commission, or who are members of local community bodies. This may be seen by some as an impediment to local democratic representation, particularly where elected members are a key part of their own communities and would therefore be expected to be involved in a broad area of activity which may lead to their being disqualified from certain decision making processes thus limiting their effectiveness as involved and committed local representatives.
- 4.3 There appears to an error in regard to the reference under paragraph 7.13 which will be highlighted as will be the omission of the protection of general exclusion in regard to the section about interests of related parties.
- 4.4 Beyond that Members may simply wish to note the terms of the revisions and form the opinion that they either codify that which has become the practice or otherwise take account of newly emerging procedures such as the new planning legislation.

5. IMPLICATIONS

Policy	None
Financial	None
Legal	The policy is one strand of scrutiny. Members should be mindful also of the role of the Scottish Public Services Ombudsman and of the Courts.
Personnel	None

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26 January 2010

APPENDIX A

COMMENTARY ON PROPOSED REVISIONS TO THE COUNCILLORS' CODE OF CONDUCT

Key Principles of the Code of Conduct

- 2.1 This adjustment clarifies that the general principles are to be used for guidance and interpretation only. This alteration is welcomed.

General Conduct

- 3.2 This makes it clear that the requirement to show respect for the Chair, and colleagues, Council employees, other members of the public applies during meetings and surgeries where a Member is performing the duties of a Councillor and are not limited simply to formal council or committee meetings. It may well have always been the case that such a view would have been taken by the Standards Commission but making it explicit is welcomed.
- 3.7 The revision introduces the concept of a real or substantive personal gain and while it does not alter the overall import of this particular provision is welcomed.
- 3.9 Isolated gifts of a trivial character up to the value of £50 are excluded from the need to declare. It is helpful to have this clarification. The code might be amplified to make it clear that if a Councillor chose, notwithstanding, to record a gift of less than £50 the provisions of the code and potential consequences for the Councillor would apply.
- 3.12 The prohibition on repeated hospitality is extended to repeated gifts from the same source, which is welcome.
- 3.16 The proper use of council facilities is clarified as the paragraph indicates that such facilities must only be used in carrying out council duties or for incidental personal use as authorised by your Council and not related in any way to party political or campaigning activities. This is welcome and reflects a request for clarification made a considerable time ago by the Council because it acknowledges that a Council might provide, say as this Council does, computer equipment under its own acceptable use policy.

Registration of Interests

- 4.1 This paragraph is adjusted to make it clear that the register should cover the period since the Member was elected to their current term of office ie for the period from one ordinary election to the next unless the member was appointed at a by-election in the interim, which is welcome.

- 4.4 The clarification that a Councillor does not have a registerable interest simply because they are a Councillor or a Member of Joint Board, Joint Committee or COSLA is welcome.
- 4.17 The requirement to register a statement of any assistance towards election expenses received within the current term of office where the value of the donation exceeds £50 will be easier for Councillors to administer.
- 4.21 An additional set of words is added to the end of this sentence to clarify that non financial interests are those which members of the public might reasonably think could influence a Councillor's actions, speeches or votes in the Council, which could include appointments to Committees or memberships of other organisations.

However an area of the Code considered not to have been addressed well enough in the review is the role of members appointed by Councils to partnerships or other external bodies not currently encompassed under the dispensations granted by the Standards Commission, or who are members of local community bodies. This is seen by some as an impediment to local democratic representation, particularly where elected members are a key part of their own communities and would therefore be expected to be involved in a broad area of activity which may lead to their being disqualified from certain decision making processes thus limiting their effectiveness as involved and committed local representatives.

- 4.22 This is a new provision which requires that gifts and hospitality received during the current term of office be recorded and this record should be available for public inspection. This brings this requirement under "one roof".

Declarations of Interest

- 5.3 There is further clarification and detail around declarations of interests which makes it clear that a Councillor must apply the "objective test" which has been redefined as "whether a member of the public with knowledge of the relevant facts would reasonably regard the interest as so significant that is likely to prejudice the discussion or decision making in your role as a Councillor". Members have always had to have regard to an objective test and making the assessment envisaged in the revision in relation to declaring the interest as distinct from deciding whether the interest requires withdrawal is welcomed.
- 5.5 The addition of the words "if known to you" which may relate to financial or non financial interests and is a small but welcome clarification.
- 5.6 & 5.7 These new provisions make it clear that there is no need to declare an interest where a general exclusion as defined in paragraph 5.18 applies but there must be a declaration where a specific exclusion applies. This recasting here at and subsequent paragraphs in the code make for easier understanding. There is a further redefinition from the word "irrelevant" in the current code to "too remote" so that there is no need to declare an interest which is so remote or insignificant that it could not reasonably be taken to fall within the objective test. There was always difficulty with the word "irrelevant" and this is welcome.

Similar provision applies in regard to a non financial interest and again the same savings in regard to the general exclusion or specific exclusions declared as being too remote or insignificant also apply in the case of non financial interest circumstances. This makes for more eloquent consistency.

- 5.9 The main change to this paragraph is to make reference to the objective test where a Member has to judge whether their interest whether taking the form of association or the holding of office would be seen by members of the public acting reasonably in a different light because it is in the interests of a person who is a Councillor as opposed to interests of a person who is an ordinary member of the public. The reference here and elsewhere to the objective test makes for consistency of interpretation.
- 5.10 The reference to certain classes of person in paragraph 5.10 is a helpful guide, and it is to be hoped that a Councillor can rely on the objective test in the absence of a definition of close relative, close friend or close associate, acknowledging there never has been such a definition. The other categories of persons covered by this paragraph are as a matter of fact easily determinable.
- 5.11

Interestingly this paragraph does not provide for the Councillor being able to rely on the general exclusion when it comes to the interests of other persons. For example, it might have been assumed that at least the general exclusion in 5.18 of being a council house tenant might have been appropriate to be included in this section because while the Councillor may enjoy that exclusion in their own right they would not in terms of this section because the Councillor's spouse is a tenant. It would seem possible that a Councillor could be a joint tenant with their spouse in a council house and the Councillor could rely on the benefit of the general exclusion to participate in their own right but would not have the same benefit to participate in declaring an interest of their spouse since the general exclusion does not apply. As a matter of pragmatism it would seem illogical for the Councillor to be able to apply the general exclusion to their interest but not to the interest of their spouse given that it would in effect be the same interest.

- 5.12 Non financial interests must also be declared for the categories of persons listed 1 to 6 in this paragraph and the comments as above are relevant.
- 5.18 This is a welcome paragraph. It sets out the general exclusions which are attached at Appendix A. It is accepted that the exclusions should not apply in respect of any matter of a quasi judicial or regulatory nature where the body in question is applying to the local authority for a licence, a consent or an approval or is making an objection or representation or has a material interest concerning such a licence, consent or approval or is the subject of a Statutory Order of a regulatory nature made or proposed to be made by the local authority.

Lobbying and Access to Councillors

- 6.3 This helpful additional sentence reinforces clarity around a Councillor making it clear, if they are lobbied, that they are not in a position to lend support for or against an application they will have responsibility for making a decision on in due course, and indicating to Members that they should simply refer representations to the appropriate department of the Council.

It will be important that when Members do this they make it clear that they are acting in terms of paragraph 6.3 of the Code and forwarding the comments to the department but are not by doing so necessarily supporting those comments unless within the face of the communication from the Councillor they indicate such support. If they do so they would therefore exclude themselves from the decision making process.

Taking Decisions on Quasi Judicial or Regulatory Applications

- 7.1 Simply as an explanation of the nature of quasi judicial or regulatory applications it is helpful to make it clear this section applies to more than planning.
- 7.5 This new paragraph is the provision that alerts Members to what was referred to earlier in the Code that if they are a member of an outside body they cannot determine a quasi judicial or regulatory matter lodged by or concerned with that outside body. This is accepted practice.
- 7.6 This clarifies that the need to determine individual applications does not limit a Councillor in the discussion or debating of matters of policy or strategy notwithstanding that these may provide the framework within which specific applications will in due course be decided. It has always been asserted by this Council that was the settled legal situation but clarification in the code is welcomed.
- 7.7 This further clarification of the right of Members to express their views and advocate proposals on the making or approval or amendment of the development plan without prejudicing their right to determine individual applications is welcome.
- 7.8 This provision is the most significant of the proposed revisions. It provides an opportunity for a Councillor in respect of a proposal for a major development to be involved in a pre application consultation. The Code indicates that as part of any such request and only as part of the planning authority forming such a provisional view the Councillor is entitled to express an opinion in advance of the application coming to the planning authority for determination, and still take part in that determination thereafter. It remains to be seen whether such a preliminary view process might in a specific case in effect be challenged in the Court on the basis of a breach of the rules of natural justice. It seems unlikely that a developer might be prepared to accept that in the circumstances a Member had not prejudged the matter. Has legal advice been taken on the possibility of such a process being challenged on the basis of the process failing to meet the rules of natural justice.
- 7.9 Paragraph 7.9 sets out the circumstances in which a Councillor may have to deal with a planning application and is self explanatory.
- 7.13 The final sentence does not appear to make complete sense. There seems to be inconsistency in wording between paragraphs 7.11 and 7.12 and to an extent with 7.15. It may be worth revisiting these in terms of consistency.

- 7.14 This provides an opportunity for Members more actively to engage in the process and this has been long sought after by some Councillors and also by members of the public. Despite the wording it may be difficult in practice for Members to negotiate the fine line between complying with the terms of paragraph 7.14 and not over stepping the mark in such a way as to give cause for concern that they have sought to lobby or otherwise promote a particular line and fall foul of paragraph 7.12. The risk remains that where the Councillor is then in the role of decision maker a challenge may arise from a party who perceives there has been prejudice notwithstanding the terms of paragraph 7.14. This will be a matter that Members will need to have a careful eye on in dealing with such matters.
- 7.15 This is about the need for a Member who wishes to make representation on behalf of constituents, to declare an interest and take no part in the process, but see comment at para 7.13 above
- 7.16 These paragraphs set out the circumstances where a planning decision may go
& through a number of decision stages. Argyll and Bute Council has always been
7.20 satisfied that it was feasible for Members to express an initial opinion on a matter and then to further participate as long as they demonstrated that they had not closed their mind to the decision making process. The proposed revision now takes cognisance of such arrangements and will be of benefit in explaining to interested parties why such arrangements can arise.
- 7.24 The Code also now makes reference to site visits and requires Councillors to follow procedures set out for such visits by the local authority. Councillors in this Council have been well used to dealing with such matters and this should not present any issues for them.