

AGENDA ITEM 10

STANDARDS COMMITTEE – 4TH DECEMBER 2012
HAMPSHIRE COUNTY COUNCIL

IN THE MATTER OF SECTION 30 AND SECTION 31 OF THE LOCALISM ACT 2011 – DISCLOSURE OF PECUNIARY INTERESTS ON TAKING OFFICE AND PECUNIARY INTERESTS IN MATTERS CONSIDERED AT MEETINGS OR BY A SINGLE MEMBER.

BRIEF TO COUNSEL TO ADVISE

Counsel has herewith :-

- (1) Copy of Code of Conduct for Members, approved by the County Council on 19 July 2012, pursuant to Section 27(2) of the Localism Act 2011.
- (2) Copy of letter dated 2 August 2012 from Paul Rowsell at DCLG, plus attached (undated) letter from Bob Neill MP and DCLG Guidance ‘Openness and Transparency on Personal Interests – A Guide for Councillors dated August 2012 enclosed therewith.
- (3) Copy previous Hampshire County Council Members’ Code of Conduct based on the Model Code of Conduct issued by the Secretary of State pursuant to the Local Authorities (Model Code of Conduct) Order 2007 (SI 2007 / 1159), in accordance with Section 50 of the Local Government Act 2000, and adopted by the County Council on 12 July 2007.
- (4) Guidance issued by the Standards Board for England ‘The Code of Conduct – Guide for Members, May 2007’ on the Model Code of Conduct referred to at Enclosure (3).

1. Provisions in respect of the conduct of Members and the registration and declaration of Members' Interests was, prior to the Localism Act 2011 ('the Localism Act'), as set out in Part III of the Local Government Act 2000 ('the 2000 Act'), and Regulations made thereunder. By virtue of the requirements of the 2000 Act, the County Council, together with other relevant authorities as specified at Section 49 (6) of the 2000 Act was required to adopt a Code of Conduct as regards to the conduct expected of Members and Co-opted Members of the County Council. A Model Code of Conduct was subsequently issued by the Secretary of State pursuant to the Local Authorities (Model Code of Conduct) Order 2007 made pursuant to Section 50 of the 2000 Act ('the 2007 Regulations'). This Model Code of Conduct is set out within the Schedule to the 2007 Regulations. By virtue of Paragraph 2(2) of the 2007 Regulations, all provisions of the Model Code of Conduct were mandatory for Hampshire County Council, being a County Council operating Executive Arrangements.
2. The Code of Conduct attached at Enclosure (3) ('the 2007 Code of Conduct') is based on the Model Code of Conduct contained within the Schedule to the 2007 Regulations and contains all mandatory provisions. The 2007 Code of Conduct was adopted by the County Council on 12 July 2007. Subject to one or two subsequent 'house styling changes', the 2007 Code of Conduct was in force until it was automatically revoked on implementation of the Localism Act Chapter 7 (Standards), by virtue of the Localism Act 2011 (Commencement No.6 and Transitional, Savings and Transitory Provisions) Order 2012.
3. As Counsel will note, the 2007 Code of Conduct contains at Part 2 ('Interests') and Part 3 ('Registration of Members' Interests') provision in respect of Members' Interests. Interests are referred to as 'Personal Interests' these are detailed at Paragraph 8 of Part of the Code. Paragraph 10 then sets out certain conditions which if met, make a Personal Interest of a Member both a

Personal and prejudicial interest. Instructing Solicitor would draw Counsel's attention to the advice from the Standards Board for England as contained at Enclosure 4 (pages 22 – 27) in this regard.

4. Paragraph 12 of Part 2 of the 2007 Code of Conduct deals with the effect of Prejudicial Interests in participation in business of the County Council, and is set out below for ease of reference.

Effect of prejudicial interests in participation

- 12 (1) Subject to sub-paragraph (2), where you have a prejudicial interest in any business of your authority
- (a) you must withdraw from the room or chamber where a meeting considering the business is being held
 - (i) in a case where sub-paragraph (2) applies, immediately after making representations, answering questions or giving evidence;
 - (ii) in any other case, whenever it becomes apparent that that the business is being considered at that meeting;
- unless you have obtained a dispensation from your authority's Standards Committee;
- (b) you must not exercise executive functions in relation to that business; and
 - (c) you must not seek improperly to influence a decision about that business.
- (2) Where you have a prejudicial interest in any business of your authority, you may attend a meeting (including a meeting of the overview and scrutiny committee of your authority or of a sub-committee of such a committee) but only for the purpose of making representations, answering questions or giving evidence relating to the business, provided that the public are also allowed to attend the meeting for the same purpose, whether under a statutory right or otherwise.

The important point for the present case is that notwithstanding the fact that a Member may have a Prejudicial Interest in business being considered, such Member may still attend and address a meeting 'for the purpose of making representations, answering questions or giving evidence relating to the

business, provided that the public are also allowed to attend the meeting for the same purpose, whether under a statutory right or otherwise'. In practice this has been taken to bestow a right for a Member to speak where such Member is speaking in a personal capacity, or as a locally elected Member representing the views of his constituents. In such cases a Member would leave the room immediately after speaking, and would not participate in any discussion of or vote on the matter.

5. The Code of Conduct attached at Enclosure 1 was approved by the County Council on 19 July 2012 pursuant to Section 27(2) of the Localism Act.
6. As indicated at Paragraph 2 above, the 2007 Code of Conduct was automatically revoked on 1 July in consequence of implementation of Chapter 7 of the Localism Act. Unlike the previous position under Part III of the 2000 Act, and subject to it being when viewed as a whole consistent with the Nolan principles Leadership, the exact form of a Members' Code of Conduct under the Localism Act is a matter of local choice.
7. The new Code of Conduct must also divert to Section 28 (2) of the Localism Act include provision in respect of the registration and disclosure of Pecuniary Interests, and set provision as County Council considers appropriate in respect of Interests other than Pecuniary Interests which the County Council requires to be registered. A 'Pecuniary Interest' is defined at Section 30(3) of the Localism Act as being a Pecuniary Interest of a description specified in Regulations made by the Secretary of State, being either an interest of the Member concerned, or set Member's spouse or person they live with as husband and wife or civil partner. The relevant authority's (Disclosable Pecuniary Interest) Regulations 2012 (the 2012 Regulations) have been made by the Secretary of State, in force from 1 July 2012. Counsel will note that provision in respect of Personal Interests and Prejudicial Interests previously contained in the 2007 Code of Conduct are not repeated in the 2012 Regulations. Instead the 2012 Regulations specify a list of Disclosable Pecuniary Interests ('DPI's'). This list of DPI's is contained at Part 2, Paragraph 3 of the 2012 Code of Conduct.

Counsel is asked to advise on the following ;

- 1) The correct interpretation of Section 31 of the Localism Act. Does Section 31(4) and 31(5) of the Localism Act prevent a Member with a DPI in a matter being considered from addressing a meeting as a private individual or as a locally Elected Member and then withdraw from the meeting, in cases where a member of the public would be allowed to attend the meeting for the same purpose, whether under a statutory right or otherwise.
- 2) Is there any distinction between the position of a Member in a personal capacity and as a locally Elected Member representing the views of his constituents.
- 3) Does the position change if such Member is also a Member of the Committee or other body of the County Council considering the matter.
- 4) What is meant by the description within the description of DPI within the 2012 Regulations 'in the employment, office, trade, profession or vocation carried on for profit or gain', in particular with regard to the words 'office' and 'so far as this affects Members of the County Council in receipt of an allowance from the County Council, and Members of the County Council in receipt of an allowance from another public authority when considering that other authority's business.
- 5) To advise generally

Should Counsel require any further information or wish to discuss any point, then please contact Instructing Solicitor, Barbara Beardwell, Head of Governance and Monitoring Officer on 01962 845157 or barbara.beardwell@hants.gov.uk

you may attend a meeting (including a meeting of the overview and scrutiny committee of your authority or of a sub-committee of such a committee) but only for the purpose of making representations, answering questions or giving evidence relating to the business, provided that the public are also allowed to attend the meeting for the same purpose, whether under a statutory right or otherwise."

9. The 2007 Model Code has now ceased to have effect by virtue of the bringing into force (for material purposes) of Schedule 4 to the Localism Act by Article 5 of the *Localism Act 2011 (Commencement No. 6 and Transitional, Savings and Transitory Provisions) Order 2012*.
10. Provision is now made in respect of the conduct of Members and the registration and declaration of their interests under Chapter 7 of Part 1 of the Localism Act.
11. By section 27(2) of the Localism Act a relevant authority (which includes a County Council) is required to adopt a code dealing with the conduct that is expected of members and co-opted members of the authority when they are acting in that capacity.
12. Section 28 makes provision in relation to such codes of conduct. By section 28(2) a relevant authority is required to secure that its code of conduct includes the provision it considers appropriate in respect of the registration in its register, and disclosure, of pecuniary and other interests. Further provision is made in relation to these matters in sections 29-34. Although those sections do not limit what may be included in a code of conduct, nothing in a code of conduct may prejudice the operation of those sections (s.28(3)).
13. Section 29(1) requires the monitoring officer of a relevant authority to establish and maintain a register of interests of members and co-opted members of the authority. By section 29(2) it is, subject to the provisions of Chapter 7, for the relevant authority to determine what is to be entered into its register.
14. The concept of "prejudicial interests" under the 2001 and 2007 Orders has not been carried into the Localism Act. Instead, section 30 makes provision in relation to the disclosure of "disclosable pecuniary interests". Section 30(3) provides:
 - "(3) For the purposes of this Chapter, a pecuniary interest is a "disclosable pecuniary interest" in relation to a person ("M") if it is of a description specified in regulations made by the Secretary of State and either –
 - (a) it is an interest of M's, or
 - (b) it is an interest of –
 - (i) M's spouse or civil partner,
 - (ii) a person with whom M is living as husband and wife, or
 - (iii) a person with whom M is living as if they were civil partners,

and M is aware that that other person has the interest."

15. The Relevant Authorities (Disclosable Pecuniary Interests) Regulations 2012 ("the Regulations") have been made under section 30(3) and came into force on 1 July 2012. The interests specified under the Regulations include "any employment, office, trade, profession or vocation carried on for profit or gain".

16. Section 31 of the Localism Act makes provision in relation to pecuniary interests in matters considered at meetings or by a single member. It provides, so far as material for present purposes:

- "(1) Subsections (2) to (4) apply if a member or co-opted member of a relevant authority—
 - (a) is present at a meeting of the authority or of any committee, sub-committee, joint committee or joint sub-committee of the authority,
 - (b) has a disclosable pecuniary interest in any matter to be considered, or being considered, at the meeting, and
 - (c) is aware that the condition in paragraph (b) is met.
- (2) If the interest is not entered in the authority's register, the member or co-opted member must disclose the interest to the meeting, but this is subject to section 32(3).
- (3) If the interest is not entered in the authority's register and is not the subject of a pending notification, the member or co-opted member must notify the authority's monitoring officer of the interest before the end of 28 days beginning with the date of the disclosure.
- (4) The member or co-opted member may not—
 - (a) participate, or participate further, in any discussion of the matter at the meeting, or
 - (b) participate in any vote, or further vote, taken on the matter at the meeting,but this is subject to section 33.
- (5) In the case of a relevant authority to which Part 1A of the Local Government Act 2000 applies and which is operating executive arrangements, the reference in subsection (1)(a) to a committee of the authority includes a reference to the authority's executive and a reference to a committee of the executive.
- [(6) – (9) omitted]
- (10) Standing orders of a relevant authority may provide for the exclusion of a member or co-opted member of the authority from a meeting while any discussion or vote takes place in which, as a result of the operation of subsection (4), the member or co-opted member may not participate.
- [(11) omitted]"

17. Section 33 provides for dispensations from section 31(4). It provides:

- "(1) A relevant authority may, on a written request made to the proper officer of the authority by a member or co-opted member of the authority, grant a dispensation relieving the member or co-opted

member from either or both of the restrictions in section 31(4) in cases described in the dispensation.

- (2) A relevant authority may grant a dispensation under this section only if, after having had regard to all relevant circumstances, the authority—
 - (a) considers that without the dispensation the number of persons prohibited by section 31(4) from participating in any particular business would be so great a proportion of the body transacting the business as to impede the transaction of the business,
 - (b) considers that without the dispensation the representation of different political groups on the body transacting any particular business would be so upset as to alter the likely outcome of any vote relating to the business,
 - (c) considers that granting the dispensation is in the interests of persons living in the authority's area,
 - (d) if it is an authority to which Part 1A of the Local Government Act 2000 applies and is operating executive arrangements, considers that without the dispensation each member of the authority's executive would be prohibited by section 31(4) from participating in any particular business to be transacted by the authority's executive, or
 - (e) considers that it is otherwise appropriate to grant a dispensation.
- (3) A dispensation under this section must specify the period for which it has effect, and the period specified may not exceed four years.
- (4) Section 31(4) does not apply in relation to anything done for the purpose of deciding whether to grant a dispensation under this section."

18. Section 34 makes provision for various offences. By section 34(1)(b) it is an offence for a person, without reasonable excuse, to participate in any discussion or vote in contravention of section 31(4).

Factual Background

19. The Council adopted a Code of Conduct pursuant to section 27(2) of the Localism Act on 19 July 2012. Part 3 of that Code addresses the registration and disclosure of disclosable pecuniary interests. Paragraphs 1.5 and 1.6 provide:

"1.5 Unless a dispensation has been granted by the County Council, you may not participate in any discussion of, vote on, or discharge any function related to any matter in which you have a disclosable pecuniary interest. You must as soon as it becomes apparent that you have such an interest (save for in circumstances set out in Paragraph 1.6 below) withdraw from the chamber or room where the meeting considering the business is being held, and must not seek improperly to influence a decision about that business. If acting as a single Executive Member you may not take any further steps in relation to the matter other than for the purpose of arranging for the matter to be dealt with otherwise than by yourself.

1.6 Without prejudice to Paragraph 1.5 above where you have a disclosable pecuniary interest in any business of the County Council (including any meeting of a Select Overview and Scrutiny Committee of the County Council) you may, notwithstanding such disclosable pecuniary interest, attend such meeting for the purpose of making representations, asking questions or giving evidence relating to such business, provided members of the public are also allowed to attend the meeting for the same purpose, whether under a statutory right or otherwise."

20. The wording of paragraph 1.6 is taken from paragraph 12(2) of the 2007 Model Code which was previously in force. As set out at paragraph 9 of my instructions, in adopting the 2012 Code, the Council considered that it (including paragraph 1.6) was consistent with the Localism Act.

21. However, since the Council adopted its 2012 Code, the Department for Communities and Local Government ("DCLG") has issued guidance for councillors on "openness and transparency on personal interests". The guidance is non-statutory and the first footnote on page 1 emphasises that it should not be taken as providing any definitive definition or the statutory requirements. Page 5 of the DCLG guidance contains the following passage:

"What does having a disclosable pecuniary interest stop me doing?

If you are present at a meeting of your council or authority, of its executive or any committee of the executive, or of any committee, sub-committee, joint committee, or joint sub-committee of your authority, and you have a disclosable pecuniary interest relating to any business that is or will be considered at the meeting, you must not:

- Participate in any discussion of the business at the meeting, or if you become aware of your disclosable pecuniary interest during the meeting, participate further in any discussion of the business, or
- Participate in any vote or further vote taken on the matter at the meeting.

These prohibitions apply to any form of participation, including speaking as a member of the public.

In certain circumstances you can request a dispensation from these prohibitions"

22. The statement "these prohibitions apply to any form of participation, including speaking as a member of the public" is inconsistent with paragraph 1.6 of the 2012 Code. It is in these circumstances that my advice on issues 1 to 3 is sought.

Question 1

23. Paragraph 1.6 of the 2012 Code is consistent with section 31(4) of the Localism Act. The key word in section 31(4) is "discussion", i.e. an "examination (of a point) by argument etc.; debate; an exchange of views; a conversation" (SOED). In my view "any discussion" for the purposes of section 31(4) is a reference to the discussion by the

members of the committee or other body determining the issue. It does not, therefore, extend to a member who is not engaged in determining the issue from making representations and providing evidence to the meeting (including questioning the evidence and representations of others).

24. This reading is supported by the statutory background to the provision, viz. the 2007 Order having introduced a new paragraph 12(2) to the model code following a perceived problem with the 2001 Order. Given this background, one would expect clear terms in section 31 if it was designed to preclude "any form of participation, including speaking as a member of the public". The better reading of s 31 does not preclude all such participation. The conclusion to the opposite effect from DCLG is misplaced. Moreover, given its non-formal status, it does not need to be followed. I emphasise that, in order to demonstrate compliance with section 31(4), the distinction between a member's activities in discussion/voting (on the one hand) and his activities in making representations/giving evidence/questioning (on the other) should be appropriately signified by clear procedures (e.g. the member with the DPI sitting apart from other members, his role being made clear in the agenda and withdrawal at the same time as members of the public).

Question 2

25. I consider that there is no distinction for the purposes of section 31(4) between a member acting in a purely personal capacity and one acting in a representative capacity and my view on issue 1 is the same in each case. Section 31(4) is directed at precluding a member with a DPI and no dispensation from participating in the discussion and voting. It is not directed at restricting other forms of participation depending on the capacity in which the member acts.

Question 3

26. My analysis on issues 1 and 2 is the same whether or not the member with a DPI and no dispensation is also a member of the committee or other body considering the matter. However, where the member with a DPI is a member of the body, particular care will be needed in signifying his limited role.

Question 4

27. In order to advise conclusively on issue 4, I would need precise details of the allowance schemes in place. However, on my general understanding of such schemes it seems to me that although being a Councillor is likely to be an "office" for the purposes of the 2012 Regulations, the receipt of an allowance is compensatory (relating to time spent and expenses incurred) and therefore not "carried on for profit or gain" for the purposes of the 2012 Regulations. On that basis, such allowances would not be DPIs.

28. My view on this issue is strengthened by section 33(2)(a) of the Localism Act. If allowances were DPIs, it seems to me a dispensation would routinely be available under this provision. In those circumstances, it would be odd for a DPI to have been created requiring dispensation (which would be required to enable the Council to function) as a matter of routine.

Question 5

29. In my view, nothing in the Localism Act requires an authority to distinguish in its register the disclosable pecuniary interests of Members under section 30(3)(a) and those under section 30(3)(b). Further, where a disclosable pecuniary interest arises under section 30(3)(b) nothing in the Localism Act requires the spouse, civil partner etc. to be named on the register. There is no specific provision to require this and section 29(2) emphasises that subject to the provisions in Chapter 7, it is "for the relevant authority to determine what is to be entered in the authority's register".

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IN THE MATTER OF SECTIONS 30-31 OF THE
LOCALISM ACT 2011

OPINION

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