

Agenda Item No:

NORTH LONDON WASTE AUTHORITY

REPORT TITLE:

GOVERNANCE

REPORT OF:

LEGAL ADVISER

FOR SUBMISSION TO:

AUTHORITY MEETING

DATE:

6 February 2008

SUMMARY OF REPORT:

This report seeks to update Members on issues relating to the revised national Code of Conduct its impact upon their roles on the Authority and as applicable as 'A' Directors and in particular issues relating to conflicts of interest.

RECOMMENDATIONS

Members are asked to note the report

Signed by Legal Adviser

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Date: 28 January 2008

1. Background

At the meeting of the Authority (in this paper also referred to as the NLWA) on 12 December 2007, Members noted that officers proposed to bring a further paper on governance issues to the next meeting, and indicated in particular that they wished to see consideration of potential conflicts of interest for those Members who had planning responsibilities in their Boroughs; and upon 'A' Directors serving as Members of the Authority.

With effect from October 2007, there was a new model Code of Conduct for Members introduced by the Government, and this report advises Members as to the implications for the Authority.

2. The Model Code of Conduct

The model Code of Conduct was issued by the Government with a requirement that it be adopted by the Councils to which it applied by 4 October 2007. The operation of the order was such that as a matter of law it was deemed to have been adopted by the relevant Councils on the 4th October had they not by that time taken steps to voluntarily adopt the new provisions.

The Councils to which this Code of Conduct applies include the London Boroughs, but not the Waste Disposal Authority itself. Therefore, Members are bound, as previously, by the Code of Conduct adopted by their own Boroughs, but the Authority does not have its own independent Code of Conduct. The Code itself makes it clear that Members are bound by the code adopted by home Boroughs whilst sitting on outside bodies - subject to it not being in conflict with any rules applying to the "outside body":

(5) Where you act as a representative of your authority—

(a) on another relevant authority, you must, when acting for that other authority, comply with that other authority's code of conduct; or

(b) on any other body, you must, when acting for that other body, comply with your authority's code of conduct, except and insofar as it conflicts with any other lawful obligations to which that other body may be subject.

Enquiries of the seven constituent Boroughs have shown that all the Boroughs have adopted a Code of Conduct in line with the Model Code. While some Boroughs have made specific additions to address their own local considerations, the provisions relating to conflicts and confidentiality are the same and it is therefore possible to provide composite advice despite those minor differences in the adopted codes.

This report does not cover the Code of Conduct in full as no doubt Members have received training on it in their home Boroughs. Instead however it seeks to deal with those aspects of most relevance to the work of the Authority and in particular the work which will be coming before Members with regard to the procurement project which the Authority is looking to embark upon.

3. Interests

The relevant extract from the Model Code of Conduct relating to personal and prejudicial interests is set out below.

(1) *You have a personal interest in any business of your authority where either—*

(a) it relates to or is likely to affect—

(i) any body of which you are a member or in a position of general control or management and to which you are appointed or nominated by your authority;

(ii) any body exercising functions of a public nature...of which you are a member or in a position of general control or management

Comment

Members who were appointed to the Authority fall within this definition. Therefore matters coming before their home authority concerning the NLWA would be a personal interest. Where matters come before the NLWA concerning their home authorities in the same way that matter would be a personal interest.

In addition Members will have a personal interest in:

a decision in relation to business of the Authority might reasonably be regarded as affecting your well-being or financial position or the well-being or financial position of a relevant person to a greater extent than the majority of other council tax payers, ratepayers or inhabitants of your authority's area.

Comment

Given that Members are a part of the NLWA it can easily be argued that their “well being” (which is defined widely) would be affected by the fortunes of the NLWA. In any event this is covered by the other provisions but is mentioned for the sake of completeness.

Where you have a personal interest, this must be disclosed to the Authority, but no further steps are required unless the interest is also prejudicial.

Special rules as to the disclosure of personal interests

Where you have a personal interest in any business of your authority which relates to or is likely to affect a person described in paragraph 8(1)(a)(i) (body of which you are a member) or

8(1)(a)(ii)(aa) (body exercising functions of a public nature, you need only disclose to the meeting the existence and nature of that interest when you address the meeting on that business.

The above paragraph therefore means that an exemption with regard to declarations applies where your interest arises solely from your membership of, or position of control or management on:

1. any other body to which you were appointed or nominated by the authority
2. any other body exercising functions of a public nature (for example another local authority) In these exceptional cases, provided that you do not have a prejudicial interest, you only need to declare your interest if and when you speak on the matter.

Comment

Therefore for members at their home authorities when a matter relating to the NLWA comes up as long as their interest is not prejudicial they need only declare their personal interest if they decide to speak. The same applies at the NLWA if a matter (as long as the interest is not prejudicial) comes before the authority relating to the member' home authority.

This rule was introduced to cover the example of where many members of an authority are governors of a school have personal interest in say a general educational discussion but not a prejudicial interest and it saves the necessity of all the members (many of whom may not even contribute) making declarations.

If you have a prejudicial interest in an item of business for the Authority, then you must withdraw from the meeting while that item is discussed.

For members to have a prejudicial interest all of the following must apply:

a) The matter does not fall within one of the exempt categories of decisions these include issues such as council tax setting etc and the relevant ones relating to the NLWA are is does apply to the decision to make a payment to any member and to the setting of the precept. If it falls under an exempt category then it is still a personal interest but does not become prejudicial.

b) The matter affects your financial interests (or those of a body which you have registered) or relates to a licensing or regulatory matter.

c) A member of the public, who knows the relevant facts, would reasonably think your personal interest is so significant that it is likely to prejudice your judgement of the public interest.

If the meeting is one where Members of the Public have a right to make representations, then you may make representations on the item before withdrawing. (This will be subject to any local rules and or procedures that the Members home Council may have adopted).

It might be therefore, and advice would need to be taken locally, that, for example, a Member could take part (in a limited way allowed by the Code) in a planning application relating to the NLWA but they could not be part of the decision making committee, debate the matter, listen in and stay in the room after they have made what limited representations are allowed, or vote.

Applying that to the NLWA therefore:

- Membership of the NLWA is a body on which you have managerial control and were appointed by your Council. It is automatically a personal interest. It is also something which should appear of your register of interests
- For 'A' directors they will be "in a position of general control or management and to which you have been appointed by your authority" (and in any event something which no doubt affects your "well being") for the purposes of the Code and therefore anything that comes before their home Borough which relates to the company will be a personal interest.
- Well-being is widely defined and includes both a positive and negative impact and includes relatively minor matters upon a Member.
- For a matter to turn from a personal interest (involving only a declaration) to a prejudicial interest which requires withdrawal from the room three specific criteria applies. These criteria are relatively restricted. This would for example on occasion mean that Members may whilst in their home authority have to declare a personal interest in a matter but (as long as the criteria are not met for that to become prejudicial) could take part in the discussion and bring their expertise to the debate.

- Should the matter be prejudicial it may still be possible for them to take part in some limited way should members of the public be able to take part albeit that they should check their local procedures.

4. Declaration of interests

The Code of Conduct as it applies to the declaration of interests is supplemented by the Authority's Standing Orders which state

- at A.23 that a copy of the register of interests shall, as it applies to Members of the Authority, be held by the Deputy Clerk, and
- at A.24 that where a contract or proposed contract is being considered in which a Member has an interest, that interest must be declared.

5. Further implications with regard to the LondonWaste Limited 'A' Directors

In addition to the matters raised above it is worth highlighting a number of other areas.

A further relevant extract from the Model Code of Conduct relates to confidential information, and states:

You must not disclose information given to you in confidence by anyone, or information acquired by you which you believe, or ought reasonably to be aware, is of a confidential nature, except where: you have the consent of a person authorised to give it; you are required by law to do so; the disclosure is made to a third party for the purpose of obtaining professional advice provided that the third party agrees not to disclose the information to any other person; or the disclosure is reasonable and in the public interest; and made in good faith and in compliance with the reasonable requirements of the authority.

The Legal Adviser has previously advised on the impact of possible interests of the 'A' Directors, and this is now reflected in the standing declaration of interest on the Agenda. To summarise being an 'A' Director is a matter which is personal interest and will often be something which is also a prejudicial interest.

Therefore it remains the correct advice under the new Code of Conduct that with regard to matters where LondonWaste Limited may have an interest in a commercial matter of business for the Authority, the interest of the 'A' Directors is both personal and prejudicial, and therefore they should withdraw from the meeting. This will apply no doubt in the same way should matters relating to LondonWaste Limited come before a Member's home Borough. However there are (given the slightly more restrictive definition of a prejudicial interest) more opportunities (say when there is no financial element and the matter is neither regulatory nor licensing) for members to take part.

The normal rights for Members of the Authority are to receive all papers relating to Authority business. In order to address this issue in the context of the current procurement process for the replacement waste disposal contract, at the last meeting a Committee was established by the Authority consisting of eight of the members of the Authority who are not 'A' Directors to deal with issues relating to the procurement. This Committee will, in common with other Committees of the Authority under Standing order A.9.1 be re-considered at the Annual General Meeting of the Authority in June. The papers for these meetings (including the minutes) will in accordance with the Authorities Standing Orders be sent to the members of the Committee only. Any request for sight of the papers from other

members of the Authority will be considered but will be treated on a need-to-know basis, bearing in mind the commercial sensitivity of these papers.

In addition to the code of conduct issues 'A' Directors as directors of a limited company have other obligations upon them. Primarily, directors must act bona fide in the interests of the company and must not exercise their powers for any collateral purpose. A director must not place himself in a position where his duty to the company and his personal interests conflict and he must not profit from his position as a director. In addition, a director must exercise reasonable care and such skill as might reasonably be expected of a person of his knowledge and experience. Should a director be charged with knowledge that might assist the company it is arguable that they are under a duty to disclose it to the company. It is important therefore from both the point of view of the director and the Authority, as it seeks to undertake a fair procurement process, that 'A' Directors are not placed in a position where they find themselves in such a difficult conflict of interest.

As the procurement process continues, Members will wish to consider whether to retain this arrangement (being the committee), or whether to consider alternatives. This will be a matter to be addressed further at the April meeting of the Authority when officers propose bringing a further report addressing this issue specifically.

6. Implications with regard to planning applications

The Authority may wish to make applications for planning permission for a facility, whether a transfer facility, recycling, or treatment. If it does so, and the land in question is within one of the constituent boroughs, Members will need to consider their position within their own Authority in conjunction with their position on the Authority.

The determination of planning permissions by local planning authorities will be in accordance with the constitution of that Borough. In some of the constituent boroughs this is carried out by area committees, in some by committees covering the whole of the borough area. Authorities are likely to have provisions allowing for planning decisions to be taken at a higher level when they are particularly significant for the Borough, and therefore this issue may be of relevance for all Members, whether or not they sit on any planning committee. However it is most applicable to those Members who sit on their home Boroughs Planning Committee.

For the purposes of a planning application from the Authority relating to land within a Member's borough, the Member being a member of the NLWA will have an automatic personal interest. This interest will also be prejudicial if, as mentioned above, that interest is one which a member of the public with knowledge of the facts would think likely to prejudice your judgement of the public interest. Given that it is a planning application then it is likely that the Member would consider that the interest is prejudicial.

In considering the proposal on behalf of the Authority, a Member will have formed an opinion as to the merits of the application, and therefore is unlikely to come with an open mind to the presentation of information at the planning authority decision making meeting. In addition there will be an interest for the Member of the NLWA in obtaining planning permission when they have previously indicated that they want this to happen to the benefit of the NLWA. Even if the Member has for example voted against the seeking of planning permission whilst sitting on the NLWA it can be argued that they have a wider interest in the result. Further they

may as part of the debate have expressed views and opinions on the proposed application which could be said to have shown a prejudgement of the issues. Whilst arguably not covered by the code this in itself would result in them not being advised to take part in a later debate on the issues in their home Borough

In these circumstances, the Member would consider advice from the Borough Solicitor of his or her own Borough, but are likely to come to the conclusion that such an interest is prejudicial. The Member could therefore, subject to this being open to members of the public and following the rules and procedures agreed locally, make representations to the decision making body, but would withdraw from the meeting before the consideration of the item. In addition the Members would need to be mindful of the rules against seeking to improperly influence the decision by way of lobbying or otherwise.

Alternatively, the Member, should for whatever reason they wish to seek to preserve their right to take part in the debate and vote in their home Borough, could take no part in the decision to make the planning application. It will then be for the Member to consider whether this is sufficient to mean that there is no prejudicial interest, bearing in mind that the Authority's business is limited to waste disposal, and that the planning application is likely to be of significance in the context of that business. Again they would need to seek their own advice but it is suggested that given their continued membership of the NLWA they would retain the personal and prejudicial interest in the matter given the rules outlined above even if they did not take part in the debate and or vote at the NLWA. The key question would be the third part of the prejudicial test namely whether a member of the public etc.

Summary

- a. Being a Member of the NLWA is, pursuant to the new Code of Conduct, automatically a personal interest which will need to be declared should any matter come before the Member for decision in the home Borough.
- b. Whether or not that matter is a prejudicial interest which would require withdrawal and non participation will depend on the usual rules being applied. In summary the matter can only be prejudicial should the matter have a financial implication for the authority, relate to a licensing, planning or other regulatory function, and which a member of the public could reasonably consider as such that it would affect the Members judgement.
- c. The same rules apply to a Member when sitting on the NLWA and faced with issues which impact upon their home Authority.
- d. 'A' Directors are in a position of having a personal interest in matters relating to LondonWaste Limited that come before the Authority. In most matters given the financial and contractual relationship it is also likely to be a prejudicial interest. They have an additional issue to consider which are general law obligations to act in the best interests of the Company and this renders as problematic them becoming charged with any knowledge which might be beneficial to the Company. In this sense therefore the usual Council practice of simply not taking part in a decision and hence avoiding breaching the code is not sufficient to protect those members.

7. Comments of the Finance Adviser

The Finance Adviser has no comments on this report.

8. Comments of the Legal Adviser

This is a report of the Legal Adviser

9. **Conclusion**

No decisions are required by Members on these issues at this stage, and they are therefore asked to note the contents of this report.

Access to Information

Code of Conduct SI 2007/1159;

Code of Conduct Guide for Members Issued May 2007

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