
Meeting	General Functions Committee
Date	9 September 2013
Subject	Director Induction and Awareness
Report of	Human Resources
Summary	To advise the Committee of all relevant advice and training given to Members and Officers on becoming nominated directors of companies in which the Council has a material shareholding interest.

Officer Contributors	Steve James, HR Consultant Trowers & Hamlin
Status (public or exempt)	Public
Wards Affected	Not Applicable
Key Decision	Not applicable
Reason for urgency / exemption from call-in	Not applicable
Function of	Council
Enclosures	Appendix 1 - Advice note from Trowers & Hamlin relating to potential conflicts of interests arising on the joint venture arrangements with Capita Symonds Ltd on the DRS project Appendix 2 - Summary of directors' duties (Companies Act 2006) Appendix 3 - Directors' interest – article 9.1 of the Articles of Association Appendix 4 - Director Awareness Training: Course Outline
Contact for Further Information:	Steve James - HR Consultant (steve.james@barnet.gov.uk)

1. RECOMMENDATIONS

- 1.1 That the Committee note the advice provided to Members and Officers of the Council on becoming nominated directors of companies in which the Council has a material shareholding interest. In particular, to note the advice provided vis a vis the nominated directors of the holding company and joint venture company created as part of the new partnership arrangements for Development and Regulatory Services.

2. RELEVANT PREVIOUS DECISIONS

- 2.1 Council 16 July 2013 – resolved that :

- Council approve the appointment of the Chief Executive and the Leader of the Council as the nominated Directors of the new company to be created to represent the Council's best interests as part of the new partnership arrangements for Development and Regulatory Services;
- Council approve the appointment of the Chief Executive and the Leader of the Council as the nominated Council representative Directors of the joint venture company with Capita Symonds Limited.

- 2.2 Cabinet 24 June 2013 – resolved that:

- Cabinet note the outcome of the evaluation stage of the Development and Regulatory Services project and accept Capita Symonds' final tender (including subsequent clarifications) as the preferred bid, with reference to the Full Business Case (Appendix A), Equalities Impact Assessment (Appendix B), List of Principal Legislation (Appendix C) and Evaluation Scores (Appendix D exempt);
- Cabinet instruct the officers to take all necessary action to complete the formalities for the finalisation and execution of the contract; and
- That Cabinet approve the formation of a Joint Venture Company with Capita Symonds Ltd and instruct officers to take all necessary actions.

- 2.3 Cabinet Resources Committee 14 December 2011 (Decision Item 5) – resolved that:

- The Cabinet Resources Committee approve the recommended Development and Regulatory Services (DRS) shortlist of two bidders for stage 2 of the competitive dialogue process;
- The recommended shortlist was: Capita Symonds Ltd and the EC Harris / FM Conway consortium. They achieved the highest two scores from the evaluation of the outline solutions provided at the end of the first stage of competitive dialogue; and
- The updated Development and Regulatory Services Business Case be noted.

- 2.4 Cabinet Resources Committee 28 March 2011 (Decision Item 5) – resolved that the Committee approve the Development and Regulatory Services business case, in order for the council to begin the competitive dialogue process, following the previously approved placing of the OJEU notice.
- 2.5 Cabinet, 29 November 2010 (Decision item 7) – resolved that the Commercial Director be authorised to commence the procurement process to identify a strategic partner for the delivery of the Development and Regulatory Services project.

3. CORPORATE PRIORITIES AND POLICY CONSIDERATIONS

- 3.1 The Corporate Plan 2013/16 has defined the following objectives:
- Promote responsible growth, development and success across the borough.
 - Support families and individuals that need it – promoting independence, learning and well-being.
 - Improve the satisfaction of residents and businesses with the London Borough of Barnet as a place to live, work and study.
- 3.2 Closer working with other service providers and in partnership with third parties is key to the delivery of these objectives and the proper training and awareness of Council representatives will ensure that the Council's best interests are provided for in a legally robust and constitutionally compliant manner.

4. RISK MANAGEMENT ISSUES

- 4.1 There are no risk management issues over and above those identified in section 7 and which are addressed by reference to the legal advice in the appendices attached.

5. EQUALITIES AND DIVERSITY ISSUES

- 5.1 Equality and diversity issues are a mandatory consideration in decision making in the Council, pursuant to the Equality Act 2010. This means the Council and all other organisations acting on its behalf must have due regard to the equality duties when exercising a public function and such an obligation is ongoing.
- 5.2 The contract with Capita Symonds requires Capita Symonds (and by extension, the joint venture company) to observe equalities and the Council's own equalities policy requirements.

6. USE OF RESOURCES IMPLICATIONS (Finance, Procurement, Performance & Value for Money, Staffing, IT, Property, Sustainability)

- 6.1 There are no resource implications related to this recommendation over and above those indicated in prior reports relating to the new arrangements for Development and Regulatory Services.

7. LEGAL ISSUES

7.1 The legal issues associated with the nomination of directors as representatives of the Council are included in the detailed legal advice provided by Trowers & Hamlin in Appendix 1, 2 and 3.

7.2 In mitigation of such risks and with particular reference to the 'Next Steps' indicated in Appendix 1, Trowers & Hamlin, together with Council officers, have:

- Ensured that nominated directors are aware of their duties as set out in the Companies Act 2006;
- Ensured that directors have read and reviewed the constitutional documents (the Articles of Association) and the joint venture agreement entered into with Capita Symonds Ltd in order to ensure that obligations are known, understood and appropriate decision making procedures are followed;
- Considered the implications on the day-to-day Council activities of the elected members and officers who are proposed as directors of the joint venture company and ensure that the provisions of the relevant officers' or members' codes of conduct are known and followed.

7.3 The above actions have been achieved through:

- The provision of relevant documents to the directors (including Articles of Association);
- Ensuring they sign to acknowledge the content of important documents such as Director Mandates; and
- Mandating their attendance at a structured training course that covered all the detail of such duties and obligations as well as the practical implications of such. A copy of the outline course content is included at Appendix 4

8. CONSTITUTIONAL POWERS (Relevant section from the Constitution, Key/Non-Key Decision)

8.1 Council's Constitution, Responsibility for Council Functions sets out functions of General Functions Committee, which includes all other Council functions that are not reserved to Council.

8.2 Relevant constitutional matters are also included in the advice provided by Trowers & Hamlin and are included in the course content in Appendix 4, to be delivered by appropriately skilled Council officers.

9. BACKGROUND INFORMATION

9.1 Other relevant background information is contained in the appendices attached.

10. LIST OF BACKGROUND PAPERS

Appendix 1 (Advice note from Trowers & Hamlin relating to potential conflicts of interests arising on the joint venture arrangements with Capita Symonds Ltd on the DRS project)

Appendix 2 (Summary of directors' duties (Companies Act 2006))

Appendix 3 (Directors' interest – article 9.1 of the Articles of Association)

Appendix 4 (Director Awareness Training: Course Outline)

Appendix 1:

Advice note from Trowers & Hamlin relating to potential conflicts of interests arising on the joint venture arrangements with Capita Symonds Ltd on the DRS project

Background

Cabinet will be asked to approve the formation of a joint venture company (JVCo) with Capita Symonds Ltd and to instruct officers to take all necessary actions in this matter. In order to form the JVCo the Council will thereafter be required to:

- approve the Articles of Association of the JVCo and enter into a joint venture agreement (the Agreement) with Capita Symonds Ltd;
- take an equity shareholding in the JVCo (a separate legal entity); and
- appoint two directors to the JVCo and the independent director/Chairman.

By setting up the JVCo and appointing directors to the JVCo the Council is raising the potential for conflicts of interests to arise on this matter. The purpose of this advice note is to set out:

- the obligations on the directors relating to conflicts of interests as contained in the Companies Act 2006, the Articles of Association, and the Council's constitution: and
- explain how they can be dealt with as part of the governance arrangements of setting up the JVCo.

Companies Act 2006

The Council is required to appoint two directors to the board of the JVCo. These directors are required to act in accordance with the Companies Act 2006 (the Act). The Act sets out detailed requirements on the directors relating to:

- the duty to act within powers (section 171);
- the duty to promote the success of the company (section 172);
- the duty to exercise independent judgment (section 173);
- the duty to exercise reasonable care, skill and diligence (section 174);
- the duty to avoid conflicts of interest (section 175);
- the duty not to accept benefits from third parties (section 176); and
- the duty to declare an interest in a proposed transaction or arrangement (section 177).

A summary of these director's duties pursuant to the Act are set out in Appendix 2.

Section 175 of the Act contains a statutory duty on company directors to avoid conflicts of interest. Conflicts in the sense used in section 175 are separated out from the duty not to accept benefits from third parties (section 176), and the duties to declare interests in proposed or existing transactions with the JVCo itself (sections 177, 182 and 183).

Section 175 requires that company directors must avoid all situations in which he/she has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the JVCo. The duty applies in particular to the exploitation of any property, information or opportunity, and it is immaterial whether the JVCo could have taken advantage of that property, information or opportunity itself.

It is a duty to avoid these situations at all times, unless one of the scenarios set out below applies:

- Under section 175(4)(a) the duty will not apply if the situation cannot reasonably be regarded as likely to give rise to conflict of interest. However unless it is very clear that this exception can be relied on, it would be safer to proceed as if there could be a potential conflict.
- Conflicts of interest arising in relation to transactions or arrangements with the JVCo itself are permitted to the extent that this is allowed in the JVCo's articles. The articles must provide descriptions of the transactions or arrangements with the JVCo which are permitted for this to be effective.
- Other section 175 'situational' conflicts can also be permitted in some scenarios, but only if the company's articles permit the directors to authorise such conflicts, and the directors (not including those directors with the conflict) actually authorise the specific conflict in question. Depending on when the constitution was drawn up, there may be additional steps to be taken to ensure that the directors have the power to authorise conflicts in this way.

All of these rules make it important to understand in detail what the directors are authorised to permit under the Articles of Association of the JVCo. It also makes it important to ensure that there are no conflicts which involve so many of the directors that it is not possible to form a quorum of directors with no conflict to authorise the situation.

From a practical point of view, it will be important to adopt and comply with a robust policy on dealing with conflicts.

The Articles of Association

The directors of the company are required to act in accordance with the Articles of Association of the JVCo. The Articles of Association of the JVCo include specific provisions relating to conflicts of interests and these are set out in full in Appendix 3.

The Council's constitution

We understand that the Council may appoint an officer and an elected member to act as the directors of the JVCo.

Should the Council decide to appoint an elected member as a director of the JVCo then the Council/elected member will need to:

- update the elected member's register of interest;
- consider the impact of becoming a director on the ability of the elected member to take part in Council business;
- ensure verbal declarations when attending meetings at which an item of business is to be considered and the elected member has a "non-disclosable pecuniary interest or non-pecuniary interest";
- notify the monitoring officer of any gift, benefit or hospitality with a value in excess of £25; and
- ensure compliance with the obligations set out in the Members' Code of Conduct.

Should the Council decide to appoint an officer as a director of the JVCo then the Council/officer will need to:

- declare any non-financial interest (including their appointment as a directors of the JVCo) in a timely manner;
- not become involved in representing the Council when holding the JVCo to account for performance, the procurement or the granting of contracts, and/or act in a way to confer other advantages on the JVCo;
- ensure a clear separation between client and contractor responsibilities;
- ensure that the director is not privy to confidential information on tenders or costs for either internal or other external contractors;
- comply with the requirements relating to gifts, hospitality and sponsorship; and
- ensure compliance with the obligations set out in the Officers' Code of Conduct.

Next steps

We advise that the Council completes the following tasks in order to manage the conflicts of interests which will arise on the formation of the JVCo and the appointment of directors:

- ensure that the directors of the company are aware of their duties as set out in the Companies Act 2006;
- ensure that the directors read and review the constitutional documents (the Articles of Association) and the joint venture agreement entered into with Capita Symonds Ltd in order to ensure that obligations are known, understood and appropriate decision making procedures are followed;
- consider the implications on the day-to-day Council activities of the elected members and officers who are proposed as directors of the JVCo and ensure that the provisions of the relevant officers' or members' codes of conduct are known and followed.

Appendix 2

Summary of directors' duties (Companies Act 2006)

A summary of director's duties pursuant to the Companies Act 2006 are set out below:

- The duty to act within powers (section 171)
 - A director of a company must act within their powers and in accordance with the company's constitution. They must only exercise powers for the purposes for which they are conferred. For these purposes, a company's constitution includes not only the company's articles of association, but also any special resolutions, agreements and certain other documents affecting a company's constitution.
- The duty to promote the success of the company (section 172)
 - A director of a company must act in the way he/she considers, in good faith, would be most likely to promote the success of the company (and in doing so must have regard to a number of statutory factors). This duty can be superseded by an obligation to consider or act in the interest of creditors if the company is approaching insolvency.
 - The extent to which this duty has been met should be addressed in the directors' report forming part of the business review required under section 415 and 417 of the 2006 Act.
 - The decision as to what will promote the success of the company (and what constitutes success), as well as any decision as to how much (if any) weight an individual factor merits, or how to balance or prioritise conflicting factors, is a decision to which the duty to exercise reasonable care, skill and diligence will apply.
- The duty to exercise independent judgment (section 173)
 - This duty codifies the principle that directors should not subordinate their powers to the will of others. It does not prevent directors from seeking external advice, but it does require them not to unreasonably follow such advice; it is the directors' responsibility to exercise the final judgment.
- The duty to exercise reasonable care, skill and diligence (section 174)
 - There is both an objective element and subjective element to this duty. It demands what may reasonably be expected of any person carrying out the functions of the director in relation to the company (the objective element) as well as the particular knowledge, skill and experience that each particular director actually has (the subjective element). For example, if a director has specialist legal skills, he/she will be expected to use those skills in order to carry out his/her duty.
 - In practical terms, this duty demands that directors attend meetings and become appropriately involved in the management of the company and its decision making processes. Directors may delegate the administrative duties of running the company to any staff and/or agents. However, they cannot delegate their responsibilities or discretions; consequently it is for them to set the policies which the officers or agents implement and to determine prudent parameters for any delegations. In addition, it is for the board to monitor and review compliance with such policies, delegations and performance generally. Adequate reporting procedures from officers or agents to the board are a vital component in protecting the directors and enabling them to fulfil their role.

- The duty to avoid conflicts of interest (section 175)
 - See advice set out above.
- The duty not to accept benefits from third parties (section 176)
 - A director of a company must not accept a benefit from a third party conferred by reason of his/her being a director or his/her doing (or not doing) anything as a director. There is no provision permitting the directors to authorise receipt of benefits for the purposes of section 176, so approval of general members of the company would be required if it were planned to do anything in contravention of this principle.
 - It should be noted that under section 176(4) this duty will not be infringed if the acceptance of the gift cannot be reasonably regarded as likely to give rise to a conflict of interest. It is probable that small gifts such as pens, pencils, diaries etc would not breach this section. However, there is no actual minimum value threshold in relation to this duty and so even the smallest of benefits which give rise to a conflict of interest will be caught.
- The duty to declare an interest in a proposed transaction or arrangement (section 177)
 - If a director of a company is in any way directly or indirectly interested in a proposed transaction or arrangement with the company, he/she must declare the nature and extent of that interest to the other directors before the company enters into the transaction. There is no specific requirement as to the form of the disclosure – it may be made by written notice, general notice or disclosure at a meeting of the directors.
 - The director is required to declare not only the nature but also the extent of his/her interest. There is no requirement to declare an interest of which the director is not aware, or to make a declaration where he/she is not aware of the transaction or arrangement in question (although he/she will be deemed to be aware of matters of which he/she ought reasonably to be aware). There is also a requirement to update any declaration which proves to be or becomes inaccurate or incomplete.
 - It should be noted that under section 177(6) this duty will not be infringed if the interest cannot be reasonably regarded as likely to give rise to a conflict of interest, or if the other directors are aware of it, or in certain situations pertaining to matters in the director's service contract.
 - The duty in section 177 is linked to sections 182 and 183 of the 2006 Act which deal with directors' interests in existing transactions or arrangements (i.e. those that have already been entered into by the company). Section 182 requires a director to declare the nature and the extent of his interest(s) in an existing transaction as soon as reasonably practicable, and make further declarations if the declaration proves to be or becomes inaccurate or incomplete. A declaration of a relevant interest made under section 177 – i.e. before the transaction is entered into – will avoid the need to also make a declaration under this section. As above, there are certain exceptions.
 - Note that a failure to comply with section 182 is a criminal offence.

Appendix 3

Directors' interest – article 9.1 of the Articles of Association

- 9.1 The directors may, in accordance with the requirements set out in this article, authorise any Conflict proposed to them by any director which would, if not so authorised, involve a director (the Interested Director) breaching his duty under section 175 of the Act to avoid conflicts of interest.
- 9.2 Any authorisation under this article will be effective only if:
 - 9.2.1 to the extent permitted by the Act, the matter in question shall have been proposed by any director for consideration in the same way that any other matter may be proposed to the directors under the provisions of these Articles;
 - 9.2.2 any requirement as to the quorum for consideration of the relevant matter is met without counting the Interested Director; and
 - 9.2.3 the matter was agreed to without the Interested Director voting or would have been agreed to if the Interested Director's vote had not been counted.
- 9.3 Any authorisation of a Conflict under this article may (whether at the time of giving the authorisation or subsequently):
 - 9.3.1 extend to any actual or potential conflict of interest which may reasonably be expected to arise out of the matter or situation so authorised;
 - 9.3.2 provide that the Interested Director be excluded from the receipt of documents and information and the participation in discussions (whether at meetings of the directors or otherwise) related to the Conflict;
 - 9.3.3 provide that the Interested Director will or will not be an Eligible Director in respect of any future decision of the directors in relation to any resolution related to the Conflict;
 - 9.3.4 impose upon the Interested Director such other terms for the purposes of dealing with the Conflict as the directors think fit;
 - 9.3.5 provide that, where the Interested Director obtains, or has obtained (through his involvement in the Conflict and otherwise than through his position as a director of the Company) information that is confidential to a third party, he will not be obliged to disclose that information to the Company, or to use it in relation to the Company's affairs where to do so would amount to a breach of that confidence; and
 - 9.3.6 permit the Interested Director to absent himself from the discussion of matters relating to the Conflict at any meeting of the directors and be excused from reviewing papers prepared by, or for, the directors to the extent they relate to such matters.
- 9.4 Where the directors authorise a Conflict, the Interested Director will be obliged to conduct himself in accordance with any terms and conditions imposed by the directors in relation to the Conflict.

- 9.5 The directors may revoke or vary such authorisation at any time but this will not affect anything done by the Interested Director prior to such revocation or variation in accordance with the terms of such authorisation.
- 9.6 A director, notwithstanding his office, may be a director or other officer of, employed by, or otherwise interested (including by the holding of shares) in, the shareholder who appointed him as a director of the Company, or any other member of such shareholder's Permitted Group, and no authorisation under article 9.1 shall be necessary in respect of any such interest.
- 9.7 Any A Director or B Director shall be entitled from time to time to disclose to the holders of the A Shares or (as the case may be) the holders of the B Shares such information concerning the business and affairs of the Company as he shall at his discretion see fit, subject only to the condition that if there be more than one A shareholder or (as the case may be) B shareholder, the director concerned shall ensure that each of the shareholders of the same class receives the same information on an equal footing.
- 9.8 A director is not required, by reason of being a director (or because of the fiduciary relationship established by reason of being a director), to account to the Company for any remuneration, profit or other benefit which he derives from or in connection with a relationship involving a Conflict which has been authorised by the directors in accordance with these Articles or by the Company in general meeting (subject in each case to any terms and conditions attaching to that authorisation) and no contract shall be liable to be avoided on such grounds.
- 9.9 Subject to sections 177(5) and 177(6) of the Act, a director who is in any way, whether directly or indirectly, interested in a proposed transaction or arrangement with the Company shall declare the nature and extent of his interest to the other directors before the Company enters into the transaction or arrangement in accordance with the Act.
- 9.10 Subject to sections 182(5) and 182(6) of the Act, a director who is in any way, whether directly or indirectly, interested in a transaction or arrangement that has been entered into by the Company shall declare the nature and extent of his interest to the other directors as soon as is reasonably practicable in accordance with the Act, unless the interest has already been declared under article 9.9.
- 9.11 Subject, where applicable, to any terms and conditions imposed by the directors in accordance with article 9.3, and provided a director has declared the nature and extent of his interest in accordance with the requirements of the Act, a director who is in any way, whether directly or indirectly, interested in an existing or proposed transaction or arrangement with the Company:
- 9.11.1 may be a party to, or otherwise interested in, any such transaction or arrangement with the Company, or in which the Company is otherwise (directly or indirectly) interested;
- 9.11.2 shall be an Eligible Director for the purposes of any proposed decision of the directors (or committee of directors) in respect of such transaction or arrangement or proposed transaction or arrangement in which he is interested;

- 9.11.3 shall be entitled to vote at a meeting of directors (or of a committee of directors) or participate in any unanimous decision, in respect of such transaction or arrangement or proposed transaction or arrangement in which he is interested;
- 9.11.4 may act by himself or his firm in a professional capacity for the Company (otherwise than as auditor) and he or his firm shall be entitled to remuneration for professional services as if he were not a director;
- 9.11.5 may be a director or other officer of, or employed by, or a party to a transaction or arrangement with, or otherwise interested in, any body corporate in which the Company is otherwise (directly or indirectly) interested; and
- 9.11.6 shall not, save as he may otherwise agree, be accountable to the Company for any benefit which he (or a person connected with him (as defined in section 252 of the Act)) derives from any such contract, transaction or arrangement or from any such office or employment or from any interest in any such body corporate and no such contract, transaction or arrangement shall be liable to be avoided on the grounds of any such interest or benefit nor shall the receipt of any such remuneration or other benefit constitute a breach of his duty under section 176 of the Act.
- Decision making arrangements relating to the joint venture company with Capita Symonds Ltd on the DRS project

Appendix 4

LBB Directors Induction & Awareness Session

Officers and members of the London Borough of Barnet may, from time to time, become directors of companies wholly owned by the Council, joint-ventures with other companies or other forms of companies. As new directors, these officers and members will require some key information and training when they are first appointed. The items below highlight the key information they will need and this information will help them to understand their role and responsibilities, fulfil their statutory obligations and comply with the law.

These items form the basis of an induction and awareness session led by LBB officers and Trowers&Hamblins.

Agenda/Content	Lead
1. The Role of the Director	
An introduction to the role and legal responsibilities of a director – including an overview of the Companies Act 2006.	Trowers&Hamblins
Specific Duties under the Act (including practical examples of the duties in action): <ul style="list-style-type: none"> • To act within powers • To promote the success of the company • To exercise independent judgement • To exercise reasonable care, skill and diligence • To avoid conflict of interest • Not to accept benefits from 3rd parties • To declare an interest in a proposed transaction or arrangement 	Trowers&Hamblins
LBB Constitution, Codes of Conduct and related matters to external directorships	LBB (Governance)
2. Operation of the Board(s)	
Overview of the Joint Venture Agreement for Capita BDRS with specific reference to: <ul style="list-style-type: none"> • Business aims & objectives • Confidentiality • Deadlock provisions • Restrictions on CSL 	Trowers&Hamblins
Overview of Articles of Association of the relevant company(s)	Trowers&Hamblins
Specific implications for directors of relevant Articles (including practical examples of implications): <ul style="list-style-type: none"> • Board structure and board decision making • Delegated authority and individual decision making • Reserved matters and referral to Cabinet • Board procedures, protocols and the conduct of company affairs 	Trowers&Hamblins
3. General Housekeeping	
Insurances in place, including directors' liability insurance	LBB (Insurance)
Directors' mandates	Trowers&Hamblins
Relevant policies & standing orders eg disclosure of price sensitive information	Trowers&Hamblins