

AGENDA ITEM: 5

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Meeting	Licensing Committee
Date	1 July 2009
Subject	Licensing Code of Practice
Report of	Director of Corporate Governance
Summary	This report presents a proposed new Licensing Code of Practice for the Council.

Officer Contributors	Donna Knight-Olds, Governance Manager
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Status (public or exempt)	Public
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Wards affected	All
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Enclosures	Appendix A – Licensing Code of Practice
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For decision by	Standards Committee
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Function of	Council
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Reason for urgency / exemption from call-in (if appropriate)	N/A
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1. RECOMMENDATIONS

- 1.1 That the Licensing Committee agrees the attached Licensing Code of Practice and recommends its adoption to the Standards Committee;
- 1.2 That, once the revised Code of Practice is agreed, Officers be instructed to promote awareness of it with Members, relevant Officers and with applicants and interested parties.

2. RELEVANT PREVIOUS DECISIONS

- 2.1 11 April 2006 – Council agreed a Licensing Code of Practice
- 2.2 6 November 2007 – Council agreed revisions to the Licensing Code of Practice
- 2.3 1 July – Planning and Environment Committee are to be asked to agree a revised Planning Code of Practice.

3. CORPORATE PRIORITIES AND POLICY CONSIDERATIONS

- 3.1 Under the Council's Corporate Plan for 2008/09 to 2011/12, one of the corporate priorities is 'More Choice, Better Value' and a key objective within this priority is 'enhancing and further developing corporate governance'. Having a revised Licensing Code of Practice that fully reflects current statutory requirements, guidance and best practice is in accordance with this priority.

4. RISK MANAGEMENT ISSUES

- 4.1 A revised Code of Practice will increase the likelihood that Licensing Sub-Committee decisions in relation to the Licensing Act 2003 and Gambling Act 2005 continue to be taken appropriately and that Members are fully aware of their responsibilities.

5. EQUALITIES AND DIVERSITY ISSUES

- 5.1 In accordance with the Council's equalities and diversity policies, the Licensing Code of Practice will apply to all Members equally.
- 5.2 The Code of Practice requires all Members to abide by the Members' Code of Conduct, which includes the general obligation: "You must not do anything which may cause your authority to breach any of the equality enactments (as defined in section 33 of the Equality Act 2006).

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

- 6.1 There are no resource implications from revising the Code of Practice.

7. LEGAL ISSUES

- 7.1 The revised Code of Practice fully reflects the following legislation, guidance and Council policies:

- The Licensing Act 2003
- The Gambling Act 2005
- The London Borough of Barnet's Member Code of Conduct
- Standards Board for England Guidance
- LACORS (Local Authorities Co-ordinators of Regulatory Services) guidance
- AcSES (Association of Council Secretaries and Solicitors) Guidance
- DCMS Guidance New Gambling Act (Councillors)
- Gambling Commission's Guidance/Codes of Practice
- London Borough of Barnet's Statement of Gambling Licensing Policy (2007)
- London Borough of Barnet's Statement of Licensing Policy (2009)

8. CONSTITUTIONAL POWERS

- 8.1 This Committee is responsible for all functions under the Licensing Act 2003 and the Gambling Act 2005 not otherwise delegated to Licensing Sub-committees.
- 8.2 The Code of Practice as recommended by this committee will be presented to the Standards Committee on 9 September 2009 for consideration. The Standards Committee has responsibility to promote and maintain high standards of conduct by Members, to assist Members to observe the Code of Conduct and to consider and make recommendations to the Council as necessary on ethical issues affecting the Council.

9. BACKGROUND INFORMATION

- 9.1 Officers have re-drafted the Licensing Code of Practice with the following aims:
- To ensure that it is fully in line with the Members' Code of Conduct as revised in May 2007
 - To ensure that it is up to date with current best practice and guidance
 - To incorporate any changes identified by Officers and Members involved in the process as beneficial
 - To bring the Licensing and Planning Codes of Practice into line with each other as far as possible both in content and format in order to facilitate ease of use, limit confusion and share best practice.
 - To improve clarity wherever possible including trying to find a balance where there has been an indication that overall brevity provides greater clarity and providing greater detail on those aspects where it has been identified that this would be beneficial
- 9.2 In early 2008, key Members and Officers were surveyed and asked the following questions:
- Do you think the Licensing Code of Practice has been helpful?

- If not, what would make it more helpful?
 - In practice, has the Licensing Code of Practice covered the required areas of behaviour?
 - If not, what areas of behaviour should it also cover?
 - Do you find the Code of Practice easy to follow?
 - If not, what would improve its clarity?
 - Do you think any other changes should be made to the Licensing Code of Practice?
 - If so, what would you suggest?
 - Is there any aspect of the Planning Code of Practice that you think should be adopted for the Licensing Code of Practice?
 - In terms of a) layout and b) content
 - How well do you think the Codes are understood?
 - By a) Members, b) Officers, c) the public?
 - What do you think would improve understanding of the Licensing Code of Practice?
 - Do you have any other comments to contribute to this review of the Licensing Code of Practice?
- 9.3 There were few responses to this consultation exercise but nonetheless the comments received were considered in preparing the revised version presented at Appendix A. Members may like to reflect on their personal answers to these questions in considering the revised draft before the Committee.
- 9.4 Further to the adoption of a revised Licensing Code of Practice it will be included with the general awareness raising proposals arising from the Ethical Governance Assessment 2008 action plan.

10. LIST OF BACKGROUND PAPERS

- 10.1 See sources listed in the draft Code of Practice.
- 10.2 Responses to survey

Members' Licensing Code of Practice

(July 2009)

1. Introduction

- 1.1 This Code of Practice applies only to hearings held by the Licensing Committee or the Licensing Sub-Committee(s) to consider licence applications under the Licensing Act 2003 or the Gambling Act 2005.
- 1.2 This Code of Practice has been prepared for all Members who may attend Licensing Sub-committee meetings whether as Members of a Licensing Sub-Committee, or in any other capacity, including making representations to such a Sub-committee as a Ward Member, or as an Applicant or an Interested Party. It applies at all time when Members are involving themselves in the Licensing and Gambling process and not just at meetings.
- 1.3 The aim of this Code of Practice is to ensure that in the licensing process there are no grounds to suggest that a decision has been in any way biased, partial or ill-founded. It should be applied in accordance with the Member Code of Conduct and, should there be any apparent conflict, the requirements of the Member Code of Conduct take priority.
- 1.4 If a Member were to behave in a way not compliant with this Licensing Code of Practice this can result in:
 - Putting the Council at risk of the legality and/or maladministration of the related decision; and/or
 - The Member at risk of an allegation of breach of the Member Code of Conduct.

2. Licensing Decisions

- 2.1 Decisions that the Council makes about Licensing matters can be quite controversial. Any application is likely to have significant impact on the neighbourhoods where people live and therefore they are subject to close public scrutiny.
- 2.2 Licensing decisions can be appealed to the Magistrates Court, , they can be challenged in the High Court and they can be the subject of a complaint to the Local Government Ombudsman. There is also a risk that Members can be named in a report made to the Standards Committee for breach of this Code. The Barnet Code of Conduct requires Members to avoid any possibility of being influenced by their own personal interests. However, for certain types of decision like planning and licensing, the requirements of the Code go further than this. Members are required to act in a quasi judicial role, without reference to their political considerations and taking into account the

issues which the law says are relevant to the decision.

2.3 When Members are making Licensing decisions, they must be:-

- a) Open-minded: a Member must not make up his/her mind until they have heard all the relevant evidence, which will not happen until the meeting itself. . If Members indicate which way they intend to vote before that, they are disbarring themselves from taking part in the decision.
- b) Open and Transparent: The rules about interests in the Barnet Code of Conduct apply with particular relevance to Members who are making licensing decisions. It is very important that in relation to each matter, Members consider whether they have an interest which should be explained to the public, or which might prevent them from participating in the committee's deliberations and the decision. A Member must seek advice as soon as s/he thinks that there may be any doubt about this.
- c) Reasonable: Another aspect of the requirement for openness is the requirement on the Council to give clear and accurate reasons for any decision that has been taken. This applies to all decisions, but the need is greatest where permission is refused, or where an application is approved, but either the application appears to be contrary to the Council's policies or an application which appears similar has recently been refused.
- d) Impartial: Most licensing decisions involve applying policies to particular situations. The policies have to be applied impartially without reference to the identity of the individuals concerned. Members should not favour any person, company, group or locality, nor put themselves in a position where they appear to do so. Members, who do not feel that they can be impartial in this way, should consider whether they are best suited to serve on the Licensing Committee.

2.4 This Code of Practice is supplementary to the Barnet Members' Code of Conduct. It is intended to show how the general principles in the Code should be applied to Licensing decisions. A breach of this Code may be a breach of the Members' Code

2.5 This Code of Practice applies equally to independent members of the Standards Committee and co-opted members of Council committees as it does to elected members.

3 General Advice

3.1 The following general advice must be considered by all Members likely to become involved in the licensing process in any way:-

- An application relating to a premises in the vicinity where a Member, (or their close associate) lives so that they are affected more than the majority of inhabitants of the Ward is likely to be a **personal and potentially prejudicial interest**.
- A Member that is a frequent visitor to the premises in a personal capacity there is likely to be a **personal and a potentially prejudicial interest**.
- A Member belonging to a lobby or campaign group that may be directly impacted by the outcome of an application is likely to have a **personal and potentially prejudicial interest**. (see also section on fettering discretion below)
- A Member having any doubts as to how the Licensing Code of Practice applies ~~they~~ should seek advice from the Monitoring Officer or his representative as early as possible.
- The Council's Member/Officer Protocols must be abided by at all times.

4. Members of the committee and sub-committees:

4.1 The role of members of the committee and sub-committee(s) is to make decisions under the Licensing Act 2003 and Gambling Act 2005 openly, impartially, with sound judgement and for justifiable reasons. This applies equally to policy decisions before the full Licensing Committee as it does with applications. Therefore, Members:

- a) Must not make a decision for party political reasons and should avoid any action that may give the perception that this is the case;
- b) Must not encourage any member of the public (including but not limited to those speaking at the sub-committee) to communicate with them orally or in writing other than through the sub-committee's procedures;
- c) Must make their decision only after due consideration of all the information and only after the presentation of the application at the sub-committee (or committee) and thus must be present for the duration of the presentation, any oral representations, debate and other deliberations upon an item in order to be able to vote on that item.
- d) Must attend all training relevant to their role as Licensing Committee members offered by the Council;
- e) Should not meet with applicants or interested parties other than at meetings arranged through the Council. A written record should be kept of any such discussions that take place prior to the meeting of the sub-committee

- f) Should, Members have any doubt about whether they need to declare an interest, they should seek the Monitoring Officer's advice as soon as possible and in any event, prior to the commencement of the sub-committee meeting. Noting that:
- i. The definitions of 'personal' and 'prejudicial' interests in the context of licensing are the same as for all other areas of the Council's work, and, as provided at paragraphs 8 and 10 of the Members' Code of Conduct, contained within the Council's Constitution;
 - ii. A personal interest does not need to be declared at a meeting where the interest arises solely from a body to which the Member was appointed by the Council or another public body, unless and until the Member speaks on the item;
 - iii. A member should not if s/he has a personal and prejudicial interest in an application sit on the sub-committee considering that application.
 - iv. A Member may sit on a sub-committee and consider an application if they have a **personal interest** which is **not prejudicial**, but are advised to decline to sit on the sub-committee.
 - v. Are advised not to sit on a sub-committee when that sub-committee is considering an application in the Member's Ward, to avoid accusations of pre-determination and to reduce the risk of legal challenge and/or to reduce the possibility of decisions being taken on the basis of political judgement. This will enable Ward Members to represent their constituents at committee hearings.
 - vi. Members may sit on a sub-committee if an application is for premises in a neighbouring or other ward **only** if the premises are not in the vicinity of where the Member lives.
 - vii. As regulatory matters such as licensing and gambling are particularly sensitive, it is recommended that Members adopt a particularly cautious approach.

4.2 When declaring an interest at licensing committee or sub-committee meeting, taking the recommended cautious approach could include considering that:

- a) it is often not enough for a Member to be unbiased, s/he must also be seen to be unbiased;
- b) connections through any organisation, whether political, charitable, social or otherwise, can create an illusion of bias, even where it does not exist; thus Members who have connections with applicants, need to be transparent and quick to reveal them;
- c) it may be prudent to be on one's guard against accusations of bias, particularly in the case of applicants and/or agents who

- might previously have made mischievous or inappropriate applications;
- d) ultimately, the decision as to whether or not to declare an interest must be the Member's own.

4.3 Equally, other members should not automatically impute bias merely because an applicant and a Member know one another.

5. Members with a personal (and prejudicial) interest

5.1 A Member may wish to exercise a right to speak on his/her own behalf or on behalf of a close associate. Such a Member:

- a) Is personally affected by an application and has a personal and prejudicial interest. S/he may make written representations to the sub-committee and may attend the meeting to make representations, answer questions and give evidence, in the same way that the public are allowed to attend the meeting for the same purpose. Unlike the public, such Members must withdraw from the committee room immediately afterwards.
- b) May appoint someone to represent him/her if s/he prefers and are advised that this is often the simplest and therefore the preferable way to proceed;
- c) Must conform to the usual deadlines for interested parties;
- d) Must not seek or accept, or appear to seek, preferential treatment;

5.2 A Member considering becoming involved in any way with a Licensing or a Gambling Act matter relating to a close associate should always consider whether, given the potential for perception of bias, whether their involvement is necessary.

6. Ward Members

6.1 A Member may wish to exercise a right to speak on behalf of another party, most likely in the role of Ward representative.

6.2 Where Ward Members are representing a constituent in respect of Licensing Act matters it is advisable, to reduce the risk of legal challenge, for the Member to:

- a) Identify the person(s) whom they represent in the form of e.g. Mr X of Smith Street or Mrs Z of Jones Lane
- b) Have a written record of their constituent's concerns. This may be in the form of an email or letter from the constituent, or the Member's note of a telephone conversation or personal meeting. Should the sub-committee hearing result in an appeal it may be necessary for the Member to substantiate the representations they have made, and documentary evidence will be necessary.

- c) Use their judgement and, as far as possible, adhere to the concerns of the interested parties and refrain from self-expression.
- 6.3 Members representing constituents in respect of Licensing Act matters must also:
 - a) Comply with the deadlines for interested parties; OR
 - b) Advise the Chairman, Democratic Services Manager or officer appointed to the sub-committee of their wish to speak as a representative of an interested party as soon as possible and at least 15 minutes before the commencement of the meeting of the sub-committee.
 - c) not seek, or accept, or appear to seek or accept, preferential treatment.
- 6.4 For Gambling Act matters related to a premises license, Members may make representations without being asked by a resident specifically to do so although Members are reminded of the wider issues of bias, and personal and prejudicial interests.
- 6.5 Members may wish to represent constituents in respect of Licensing Act matters where they have an interest in the matter also. However:
 - a) those Members who have a personal and prejudicial interest may attend the meeting to make representations, answer questions and give evidence on that other party's behalf, including in their capacity as a Ward Councillor representing their constituents, but must withdraw from the committee room completely immediately afterwards and must not take part in the discussion part of the application . However, Members in such a position are advised that it may be simplest and therefore preferable to instead ask someone else, for example, one of his/her fellow ward Councillors, to make the representations on behalf of the other party instead.
 - b) those who have a personal interest that is NOT prejudicial, may appear on behalf of another party, including in their capacity as a Ward Councillor representing their constituents. They may remain in the committee room for the entire hearing . However, Members in such a position are advised that it will usually be simplest and therefore preferable to instead ask someone else, for example one of his/her fellow ward Councillors, to make the representations on behalf of the other party instead.

7. **Avoiding fettering discretion and dealing with Lobbying**

- 7.1 Members are frequently approached by applicants and interested parties who wish either to 'lobby' Members or to ask advice. It is very

important that no Member fetters his/or her discretion and therefore his/her ability to participate in decision-making by making up his/her mind, or appearing to have done so, prior to the matter's formal consideration and the hearing of the officer's presentation and the evidence and arguments from applicants and interested parties at the sub-committee.

- 7.2 If a sub-committee member is approached by any means by persons wanting to lobby them regarding a licensing matter to be heard by that sub-committee then the Member is strongly advised to:
- a) explain they cannot discuss the matter;
 - b) to refer the person to their Ward Member (not being on the sub-committee) and/or Licensing Officer;
 - c) make and keep a written record of these instances in case the matter proceeds to an appeal;
 - d) declare the circumstances of the lobbying at the meeting considering the item;
 - e) pass any correspondence to the Monitoring Officer at the earliest opportunity and encourage the applicant to submit written information to the Licensing Officer;
 - f) Avoid giving any commitment or impression of a commitment; that they hold any particular view about the matter or how they will vote;
 - g) Where possible, provide information on the Council's general licensing policies and procedures only.
- 7.3 Members, if they wish to be free to debate and vote on an application, should avoid organising support for or opposition to a licensing matter to be determined by Committee and should not lobby other Members as such actions can easily be misunderstood by parties to the application and by the general public.
- 7.4 If a Member realises that s/he has fettered his/her discretion by some comment or action then this must be declared and the Member should not take part in the discussion on that item or vote. S/he may remain in the room but may prefer to withdraw.
- 7.5 An important element of the Members' Code of Conduct is the general obligation not to "use or attempt to use your position as a Member improperly to confer on or secure for yourself or any other person, an advantage or disadvantage." In terms of the licensing process, lobbying of Members can lead to the impartiality and integrity of a Member being called into question. The acceptance of lobbying can cause public mistrust of Local Licensing Authorities. Therefore, the actions and conduct of Members should be seen to be appropriate and above suspicion to an impartial outside observer.
- 7.6 Decisions should be taken in the interests of the Borough as a whole and should not be improperly influenced by or in favour of any person,

company, group or locality. The key is to demonstrate that each Member's decision was taken on relevant considerations alone.

- 7.7 No Member should accept any gifts or hospitality from an applicant or interested party in a Licensing matter. If a degree of hospitality is entirely unavoidable then the Member should ensure it is of a minimum, its acceptance is declared as soon as possible and it must be recorded in the Member's register of interests if its value is over £25.
- 7.8 Members of the Licensing Committee should discourage applicants or agents from approaching them, should aim to minimise social contacts with known Licensees or agents, and refrain from such contacts when an application has been submitted.
- 7.9 A Member will not have fettered his/her discretion by:
- a) Receiving or listening to viewpoints from interested parties
 - b) Making comments to applicants, interested parties, other Members, or Officers provided the comments do not amount to pre-judging and the Member makes it clear that s/he is keeping an open mind.
 - c) Seeking information through any alternative channel other than Democratic Services.
 - d) Simply being a member of a group or organisation that may make representations on a particular matter before a Sub-committee where there is no direct impact on the Member and s/he is not otherwise fettered by any actions or comments made in relation to the group's representations. However the Member should make it clear to both the group or organisation and the committee that s/.he has reserved judgement on the matter prior to its consideration at committee.

8. Guidance on Site Visits

- 8.1 Site visits by Licensing Sub-Committee Members are extremely rare and generally unnecessary and can put individual Members and the Licensing Authority at risk of accusations of bias.
- 8.2 Site visits are only likely to be appropriate where one would assist the sub-committee in making a more informed decision in a shorter time such as:
- where the application to be considered by the sub-committee is factually complicated; or
 - where a hearing is expected to last a full day or more; and
 - where a site visit would materially reduce the time required by the sub-committee to clarify factual matters such as details of premises layout.

- 8.3 There are restrictions on the organisation and attendance at site visits, which would be organised by Licensing Officers. These include that:
- a) Licensing Officers would accompany the sub-committee members
 - b) Democratic Services Officers would not be present
 - c) All Sub-committee Members must visit at the same time
 - d) The applicant would be requested to consent to allowing all interested parties to attend at the same time and if permission was not granted the visit could not proceed
 - e) No refreshments or the like should be provided although the use of lavatories is permitted
 - f) There should be no discussion as to the application, save as was strictly necessary to clarify factual queries eg re. layouts.
 - g) The site visit should only be an opportunity to seek information and to observe the site
 - h) Applicants may be invited to make a factual presentation and respond to questions
- 8.4 A report of the visit would be prepared by the Licensing Officer and would form part of the full report presented to the sub-committee.

Sub-committee Members should not visit a site that is subject to an application (or one subject to any enforcement) other than as part of an official site visit.

9. The Ombudsman

- 9.1 The Local Government Ombudsman (more properly known as the Commissioner for Local Administration in England) has a variety of powers.
- 9.2 In essence, however, the Ombudsman cannot challenge the decision made by any Licensing Sub-committee but can challenge the way in which that decision was made. If a committee fails to address a number of issues properly, then the Ombudsman might decide that this amounted to “maladministration.” If the Ombudsman also considers that injustice has been done, he then has a variety of powers to call for a remedy.
- 9.3 However, that does not mean that the Ombudsman has the power to overturn licensing decisions; only the courts of law and can do that and only in strictly defined circumstances.
- 9.4 The potential for maladministration, however, concerns the Council’s Monitoring Officer as, amongst other things, this could result in an award of compensation.

10. **Sources**

This Code follows the following statutory requirements:

- The Licensing Act 2003
- The Gambling Act 2005
- The Member Code of Conduct

and draws on the following guidance

- Standards Board for England guidance
- LACORS (Local Authorities Co-ordinators of Regulatory Services) guidance
- AcSES (Association of Council Secretaries and Solicitors) guidance
- DCMS Guidance New Gambling Act (Councillors) Explained
- Gambling Commission's Guidance/Codes of Practice
- London Borough of Barnet's Statement of Gambling Licensing Policy (2007)
- London Borough of Barnet's Statement of Licensing Policy (2009)