

REPORT TO: POLICY AND RESOURCES COMMITTEE – 10 NOVEMBER 2003
REPORT ON: LOBBYING
REPORT BY: DEPUTE CHIEF EXECUTIVE (SUPPORT SERVICES)
REPORT NO.: 766 – 2003

1. PURPOSE OF REPORT

1.1 The purpose of this Report is to set out the Depute Chief Executive (Support Services) advice to Elected Members regarding lobbying.

2. RECOMMENDATION

2.1 It is recommended that Elected Members note the Depute Chief Executive (Support Services) advice.

3. FINANCIAL IMPLICATIONS

3.1 There are no financial implications arising out of this Report.

4. LOCAL AGENDA 21 IMPLICATIONS

4.1 There are no Local Agenda 21 implications arising out of this Report.

5. EQUAL OPPORTUNITIES IMPLICATIONS

5.1 There are no equal opportunities implications arising out of this Report

6. MAIN TEXT

6.1 LOBBYING AND PLANNING MATTERS

Members may recall that the National Code of Local Government Conduct did not make specific provision regarding lobbying of Councillors dealing with planning matters. Following the Nolan Report on Standards in Public Life a Code of Practice for Members dealing with planning matters which included a section on lobbying was therefore approved by the Council although it was not legally binding.

Sections 6 and 7 of the Councillors Code of Conduct which is legally binding under the Ethical Standards in Public Life etc (Scotland) Act 2000 contains specific provisions on lobbying and access to Councillors dealing with planning applications and this therefore supersedes the earlier Code of Practice.

6.2 LOBBYING AND LIQUOR LICENSING AND CIVIC GOVERNMENT LICENSING

The City Council approved a Code of Practice for Members dealing with licensing matters and Members should continue to be guided by it in dealing with licensing matters (Appendix 1).

So far as liquor licensing is concerned however canvassing in the sense of an attempt by an applicant or of another person at his instigation to influence a Member of a Licensing Board to support his application for a grant, renewal or permanent transfer of a Licence or for a regular extension of permitted hours before the application is considered by the Board is an offence under Section 19 of the Licensing (Scotland) Act 1976. Any Member of the Licensing Board who finds themselves in this position ought to report the matter to the Police and would be well advised not to take part in the consideration of the application at all.

6.3 **RECORDING LOBBYING**

Elected members will recall that they are obliged to comply with the Code of Conduct. In order to help them to do so the Depute Chief Executive (Support Services) has produced forms (Appendix 2) on which members should record any approach that has been made to them in connection with a planning or licensing matter, whether by an applicant, an objector, an MP, MSP etc. The form will also record whether or not the member has responded to that lobbying and whether or not they have a financial, non-financial or personal interest in the outcome of the matter such that they will be declaring an interest and/or refraining from taking part in the consideration of the application. These forms are available from and returnable to the Committee Services Section.

6.4 **CONCLUSION**

Elected Members are asked to be particularly aware of their obligations under the Standards Commission's Code of Conduct and the Council's Licensing Code of Practice because the quasi judicial nature of Planning and Licensing Applications may result in complaints being made not only to the Standards Commission but also to the Courts.

7. **CONSULTATION**

7.1 The Chief Executive and the Depute Chief Executive (Finance) have been consulted in the preparation of this Report.

..... Patricia McIlquham

Date 3 November 2003

Depute Chief Executive (Support Services)

NOTE

No background papers, as defined by Section 50D of the Local Government (Scotland) Act 1973 (other than any containing confidential or exempt information) were relied on to any material extent in preparing the above Report.

APPENDIX 1

CODE OF PRACTICE FOR MEMBERS DEALING WITH LICENSING MATTERS

INTRODUCTION

This Code of Practice applies to all Councillors who become involved in operating the licensing system. Under the Licensing (Scotland) Act 1976 and the Civic Government (Scotland) Act 1982 and other statutes the City Council and the City Council's Licensing Board are the licensing authorities for Dundee and have the responsibility for granting or refusing applications for licences and other related consents. A refusal of a licence may be subject to appeal to the Sheriff and in certain circumstances decisions of the Licensing Committee or Licensing Board may be challenged in the Court and may be subject to investigation by the Ombudsman.

THE NEED FOR A CODE

Licensing matters are potentially contentious because licensing decisions can affect the daily lives of applicants and objectors as well as the private interests of individuals, landowners and neighbouring occupiers. The licensing system generally frequently creates winners and losers. The financial consequences of a decision may be enormous. It is important therefore that licensing authorities should make the decisions affecting these interests openly, impartially, with sound judgement and justifiable reasons. The process should leave no ground for suggesting that there is any justification in the suggestion that a decision has been partial, biased or not well founded in any way.

The purpose of this Code of Practice is to assist members in reducing their vulnerability to unfounded allegations and having their decisions overturned in Court.

STATUS OF THE CODE

This Code is not legally binding. It is only advisory. However, failure to follow the Code without good reason could be taken into account in investigations into possible maladministration or have implications for the standing of Councillors and Board Members. Failure to follow the Code may result in indefensible decisions which are then reversed on appeal with the finding of expenses against the Council or the Board.

THE GENERAL ROLE AND CONDUCT OF COUNCILLORS

The Nolan Committee in its report on Standards in Public Life said of Planning and Licensing:- "Councillors exercise quite properly two roles in the planning system. They determine applications, arriving at a decision on granting or refusing permission by using planning criteria and by excluding non-planning considerations. They also act as representatives of public opinion in their communities. Planning is not unique in this respect. Determining licensing applications is a similar process." Councillors and officials have different but complimentary roles. Officers advise Councillors and Board Members and execute the Council's and Board's decisions. They are employed by the Council not by individual Councillors or Board Members and it follows that instructions may only be given to officers through the Council, Committee or Board decision. A successful relationship between Councillors and Officers can only be based upon mutual trust and understanding of each other's roles. This relationship and the trust which underpins it must never be abused or compromised by Councillors.

Both Councillors and Officers are already guided by Codes of Conduct, National and Local. Breaches of the National Code may be regarded as maladministration by the Local Government Ombudsman and failure to declare a pecuniary interest may be a criminal offence. In addition to these Codes the Council's Standing Orders where relevant and the relevant statutes govern the conduct of licensing matters.

EXERCISE OF DISCRETION

Both the Licensing Board acting under the 1976 Act and the Licensing Committee are vested with an administrative discretion. The procedure which a Board or Committee adopts is a matter for

the Board or Committee provided that each party is given the same opportunity to address the Board or Committee or to contradict information put before the Board or Committee. The Board or Committee may determine whether or not to proceed to a Hearing on evidence or merely to determine the application by reference to submissions and productions.

When a Board or Committee exercises its discretion it is required to act lawfully in the broader sense of the word; it must exercise a real discretion, which it must not fetter; it must take into account relevant considerations and not consider the irrelevant; it must exercise its discretion reasonably; it must not use its discretion for improper purposes or in bad faith; it must not act ultra vires; it must not reach a decision based on an error of law and it must not act contrary to natural justice in its procedures and in reaching its decision.

In assessing the exercise of a discretion by a Licensing Board or Committee a Court should take into account the fact that a Licensing Board or Committee is deemed to know its own area and to have some expertise in assessing problems relating to licensed premises. The appropriate test for a Court is to consider whether a reasonable Board rather than a reasonable person would have taken the course adopted by the particular Board.

LICENSING BOARD'S ENTITLEMENT TO FORMULATE GENERAL POLICIES

A Board is entitled to have a general policy which is relevant to the statutory provisions, provided it has a proper basis in fact and law for adopting the policy. The Board may apply the policy, provided it gives notice of the policy and gives each applicant an opportunity to explain why they should be exempt from the general policy. The Board must apply its mind to each application and must not apply the policy rigidly. Having said that, where a Board have a policy, it is entitled to depart from that policy and adopt a new and different one.

BREACH OF NATURAL JUSTICE

A breach of natural justice tends to relate to the conduct of the Hearing rather than to the decision. The principles of natural justice demand that both sides must be given an equal opportunity in presenting their case and of knowing the case they have to answer; and the Licensing Board or Committee should not be or even appear to be judges in a matter in which they have an interest; and that justice must not only be done but be seen to be done. Particular sections of the 1976 Act for example are designed to prevent breaches of natural justice. For example Section 2 deals with disqualification of interested persons from the Board, Section 16 deals with objections to be lodged and served timeously on all parties and Section 32 deals with the need to hold a Hearing before a licence can be suspended.

LOBBYING

Apart from the disqualifications in statute there are also common law disqualifications. For example on occasions the Courts have disqualified a member of a tribunal or Board if there are circumstances so affecting a person acting in a judicial capacity as to be calculated to create in the mind of a reasonable person a suspicion of that other person's impartiality. Those circumstances are sufficient to disqualify although in fact no bias exists. Accordingly, the lobbying of Councillors and Board Members by applicants or objectors presents an obvious difficulty. This is because such lobbying can of course lead to impartiality of a Councillor being called into question. Councillors never will prevent people from trying to lobby them and indeed local democracy would suffer if it did. The important point is to ensure that Councillors respond to lobbying in a way which would not give reasonable grounds for their impartiality to be questioned.

Lobbying should be dealt with in a transparent way and declared at an appropriate time. When being lobbied members should take care about expressing an opinion and restrict themselves to giving procedural advice. Accordingly, it is recommended that where members are approached at their surgery by an applicant or objector who wishes to explain their position or obtain the member's support for their position, the member explains that it is improper for them to get into a detailed discussion with that person alone. Members should refuse to enter into discussions regarding the detail of the application and should be cautious not to give any commitments or say anything which could be construed as a commitment. It is recommended that members simply listen to a point of view about an application and provide procedural advice. Members should

avoid indicating or giving the impression of support or opposition to an application or declaring their voting intention before a decision is to be taken. To do so without all relevant material and evidence and views could be unfair and prejudicial.

Approaches to members may be personal, for example a casual meeting in the street, or by telephone. In such circumstances members must exercise their own judgement as to how much they hear. They must have regard to their own position and the fact that they will be unable to prove later what may have been said. It is undesirable to allow situations to take place where matters can be misconstrued. It is clear that members should not accept invitations to meetings or social events to discuss an application. Where a letter or other document relating to an application is received by a member it is recommended that this should be copied to the Director of Support Services. If it appears to the Director of Support Services that the letter may be seeking to put undue influence on a member the Director will write to the author of that letter advising them of the appropriate channels of communication.

LIABILITY FOR DAMAGES

The question is often asked, whether an action of damages lies against the Board or Committee which have refused to grant a licence or related permission and are later found to have acted unlawfully or unreasonably. The Licensing Board and Committee are exercising a quasi judicial function. They enjoy an immunity for acts done or words spoken unless they have acted fraudulently, with collusion or maliciously. An action of damages will only lie against the Licensing Board or Committee if the disappointed party can show that in reaching its decision the Board or Committee acted fraudulently with collusion or maliciously.

In assessing the exercise of a discretion by a Licensing Board or Committee a Court should take into account the fact that a Licensing Board or Committee is deemed to know its own area and to have some expertise in assessing problems relating to licensed premises. The appropriate test for a Court is to consider whether a reasonable Board rather than a reasonable person would have taken the course adopted by the particular Board.

APPENDIX 2

**FORM FOR RECORDING AN INSTANCE OF LOBBYING OR
DECLARING AN INTEREST IN A PLANNING OR LICENSING MATTER**

Name: Councillor

Identity of Individual/Company/ Organisation making approach/ lobbying	Subject of approach/lobbying	Nature of approach (*verbal/**written) * Give a brief outline here ** Attach a copy of letter/e-mail	Your Response (Describe briefly) (See Guidance Note)	If you have an interest whether Financial or non- Financial in the matter on which you were approached please detail it below

It is my intention to declare/not declare an interest in and vote/not vote on this matter when it comes before Committee.

