

**BABERGH DISTRICT COUNCIL**

**FROM:** The Monitoring Officer

**REPORT NUMBER**    **F163**

**TO:**     STANDARDS COMMITTEE

**DATE OF MEETING** 26 January 2007

**IMPLICATIONS OF THE HIGH COURT DECISION IN LIVINGSTONE V. ADJUDICATION  
PANEL FOR ENGLAND 2006 ON THE CODE OF CONDUCT FOR MEMBERS**

1.    **SUMMARY**

Members will recall that at the meeting of Standards Committee on 27 October 2006 consideration was given to the court findings concerning alleged breaches of the Code of Conduct by Ken Livingstone, Mayor of London. In particular, Members noted the inconsistency between the Code of Conduct and section 52 of the Local Government Act 2000 (requiring members to observe the Code of Conduct “in performing his functions”) and the significant narrowing of the Code in respect of conduct arising in a member’s private life as a consequence of the court decision.

This report analyses the decision in more detail and updates Members on the implications of the decision along with the advice now provided by the Standards Board on interpretation of the Code.

2.    **RECOMMENDATIONS**

That the content of this report be noted.

The Committee is able to resolve this matter.

3.    **FINANCIAL IMPLICATIONS**

None.

4.    **KEY INFORMATION**

4.1   **THE BACKGROUND**

4.1.1   The background to the High Court decision of Livingstone v. Adjudication Panel for England 2006 is as follows:-

In February 2005, Ken Livingstone, Mayor of London, hosted a function at the City Hall. As he was leaving the function, he was approached by a reporter of the ‘Evening Standard’ newspaper who recorded on tape an exchange with the Mayor, in which Livingstone refused to offer a comment, on the basis that he disapproved of the Evening Standard. In the ensuing exchange, the Mayor asked ‘What did you do before? Were you a German war criminal?’ to which the reporter replied ‘No, I’m- Jewish. I wasn’t a German war criminal ... I’m actually quite offended by that ... ’. The Mayor replied ‘Well you might be, but actually you are just like a concentration camp guard. You’re just doing it ‘cause you’re paid to aren’t you?’. The exchange continued, the Mayor continuing to refuse to offer comment on the function, instead denigrating the reporter’s newspaper as ‘reactionary bigots’ ‘who supported fascism’.

- 4.1.2 Subsequently, Livingstone made a statement to the London Assembly refusing to apologise for his actions and continued elsewhere to refuse to do so. A formal complaint was made by the Board of Deputies of British Jews to the Standards Board for England. An Ethical Standards Officer investigated the complaint and reported to the Adjudication Panel of the Standards Board. The Adjudication Panel found that the Mayor had not, contrary to the report of the officer, been acting in his official capacity at the time of the incident. However it found that the Code of Conduct of the Greater London Authority nevertheless applied to the Mayor at the time, and it went on to find that the Mayor had breached that Code. It directed that the Mayor be suspended for a period of four weeks.
- 4.1.3 The Mayor appealed to the High Court and the suspension was itself suspended pending the outcome of the appeal. He contended that he had not been acting in his official capacity at the material time, and was therefore not within the Code. He contended further that, in any event, the decision impinged upon his right to freedom of expression under art 10(2) of the European Convention on Human Rights. He also contended that the penalty had been disproportionate.
- 4.1.4 The High Court allowed the appeal. ‘Performing his functions’ extended wider than acting ‘in his official capacity’, to cover such things as misusing his position for personal advantage. Unlawful conduct was not necessarily covered, however, and if it had been thought appropriate by Parliament to subject a member of a local authority to a code which extended to conduct in his private life, Parliament should have spelt it out. Accordingly, on the true construction of the Local Government Act 2000, the Mayor had not been ‘performing his functions’ at the relevant time. Therefore, the Code of Conduct did not apply to his actions. The phrase ‘performing his functions’ had to have been included by Parliament in order to place a limit on the application of the Code of Conduct.
- 4.1.5 However offensive and undeserving of protection the Mayor’s outburst might have appeared, any individual could say what he liked, provided it was not unlawful, unless there were clear and satisfactory reasons within the terms of art 10(2) to render him liable to sanctions. The tribunal had misdirected itself in deciding that it was proportionate for the Code to extend as far as it did, to cover the Mayor’s statements. Accordingly, even if the Mayor’s comments had been subject to the Code, and even though he had not been expressing a political opinion attracting a higher level of protection, his right of freedom of expression precluded sanctions under the Code. Moreover, even if there had been a failure to comply with the Code, the sanction imposed had been disproportionate on the facts, and would not have been upheld.

## **4.2 IMPACT OF THE DECISION**

- 4.2.1 Following the High Court decision a more restrictive view needs to be taken of when the Code of Conduct can apply to the actions of a councillor. There are two provisions of the Code that apply not just when a councillor is acting “*in his official capacity*” but also “*in any other circumstances.*” These are paragraphs 4 (bringing your office or authority into disrepute) and 5(a) (improperly using your position to secure or confer an advantage or disadvantage).
- 4.2.2. However, the interpretation of the words “*or in any other circumstances*” has now been replaced by a much stricter interpretation arising from the decision of the High Court. The term “*any other circumstances*” will be limited to situations where the member is “performing his functions.” The words “*performing his functions*” does not extend to actions beyond those carried out in a member’s “official capacity.” Therefore, a councillor convicted of shoplifting or drunken driving is not caught by the Code if the offending had nothing to do with their position as a councillor.

### **4.3 STANDARDS BOARD GUIDANCE**

- 4.3.1 Since the judgment, the Standards Board has been working with Government, the Adjudication Panel for England and ACSeS to clarify the scope of the Code, how cases should be handled at the present time, and whether the position should be rectified by future legislation.
- 4.3.2 In the light of the judgment, the Government has included proposals in the current Local Government and Public Involvement in Health Bill to make clear that the Code of Conduct is not limited to actions taken only in an official capacity and to delete the words “in performing his functions” from section 52. However, until that legislation, if enacted, comes into force we need to apply the law as declared by the High Court.
- 4.3.3 The Standards Board for England has issued guidance to set out the position, as the Board currently understands it. However, it warns that readers should be mindful that while some aspects of the High Court decision are very clear others are not and each case is likely to turn on its own facts.
- 4.3.4 The Standards Board guidance on the principles of whether a councillor is acting in an official capacity is as follows: -
- For the Code to apply, it will need to be established that, if the councillor was not acting in an official capacity, he/she had nonetheless used or sought to use his/her “status” as a councillor of the council. An example would be where a councillor, in dispute with a neighbour about their planning application, threatens to speak to colleagues on the planning committee.
  - The use of the “status” must be of a type that is capable of amounting to a failure to comply with the code. For example, where a councillor attended a private pre-meeting to discuss a report, which included a proposal to purchase some land for the council to redevelop new offices, and then, immediately after the meeting, the councillor contacted the owner and anonymously agreed to buy the property quoted to the council.
  - In establishing disrepute to a councillor’s office or authority, standards committees will need to be persuaded that the misconduct is such as to damage the reputation of the councillor’s “office or authority” as opposed to simply damaging the reputation of the individual concerned.
  - The bar in the above cases “will be set quite high” and “ the test [in each] will not be easy to meet”(i.e. it will be more difficult to establish a breach of the Code in these cases). However, the Standards Board believes that some considerations that might tip the balance in favour of disrepute to the office or authority of the councillor are:-
    - (a) situations where the councillor has put his/her private interests over and above the public interest, and therefore reduced the standing of his/her office by flouting public interest for private gain e.g. by using their position to secure a personal profit.
    - (b) situations where a councillor defies important and well-established rules of the authority for private gain.
    - (c) situations where a councillor engages in conduct that directly and significantly undermines the authority’s reputation as a good employer or responsible service provider.

- It is emphasised that any case involving an allegation that a councillor has brought his/her office or authority into disrepute when the councillor was not acting in his/her official capacity will need to be carefully scrutinised. In doing so, it will be necessary to establish whether or not the action complained of was carried out as a councillor or by reference to the capacity as a councillor. Careful consideration will be required into establishing how the action complained of does more than just bring the individual into disrepute.

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