

BABERGH DISTRICT COUNCIL

FROM: The Monitoring Officer

REPORT NUMBER: **J218**

TO: STANDARDS COMMITTEE

DATE OF MEETING: 7 April 2010

INDEMNITIES FOR MEMBERS AND OFFICERS

1. PURPOSE OF REPORT

- 1.1 To consider whether the Council should put in place indemnities for all members and officers for personal legal liability that may arise whilst undertaking official duties where there is no existing immunity.

2. RECOMMENDATION TO COUNCIL

- 2.1 That the Council indemnifies each of its members (including co-opted members) and officers in the terms set out in Appendix 1 to this report and the Director of Corporate Services be authorised to make any modifications as may from time to time be necessary.

The Committee is asked to make recommendation to Full Council.

3. FINANCIAL IMPLICATIONS

- 3.1 The Council's insurers, Zurich Municipal Insurance, have confirmed that subject to certain restrictions our existing policy indemnifies members and officers when carrying out any function which is at the request, approval or purposes of the Council. This extends to functions where appointment has been made to an outside body provided that the Council had legal power to approve the activity and support the appointment. There are however some restrictions and these are set out in paragraphs 5.3- 5.4 below.
- 3.2 There is currently a £1,000 excess on the Council's insurance policy for the defence of defamation proceedings. This sum would be incurred by the Council in each claim unless passed on to the member/officer.

4. RISK MANAGEMENT

- 4.1 This report is most closely linked with the Council's Significant Business Risk No. 4 (Governance). Key risks are set out below:

Risk Description	Likelihood	Seriousness or Impact	Mitigation Measures
Members or officers incur personal liability for acts or omissions whilst undertaking Council business or as a council appointee on a outside body	Low	Critical	Council indemnity to members and officers

Risk Description	Likelihood	Seriousness or Impact	Mitigation Measures
Unlimited financial liability of the Council under an indemnity	Low	Significant	With some exclusions, liability is covered by the Council's policy

5. **KEY INFORMATION**

THE BACKGROUND

5.1 Council members and officers already enjoy statutory immunity from personal liability where acting in good faith, without recklessness and within the powers of the Council. The Local Authorities (Indemnities for Members and Officers) Order 2004 permits authorities to indemnify their members and officers and take out insurance cover for certain activities not covered by the statutory immunity.

5.2 Those activities are as follows:-

(1) Where the member/officer is carrying on any function at the request of, or with the approval of, or for the purposes, of the Council.

This extends to cases in which the function is undertaken in a capacity other than that of member or officer e.g. the member/officer acts as a director of a company at the request of the Council.

(2) The defence of criminal proceedings.

This is subject to the terms of the indemnity providing that if the member or officer is convicted of a criminal offence and that conviction is not overturned on appeal, then the Council, or insurer as the case may be, is reimbursed.

(3) Civil liability arising as a consequence of any action or failure to act which amounts to a criminal offence

(4) The defence of a defamation action

(5) Where the action or failure to act is outside the powers of the Council or the powers of the member or officer and the member/officer reasonably believed that the act or omission was within their powers at the time

(6) Costs of defending a Code of Conduct investigation against a Member

This is subject to the terms of the indemnity providing for reimbursement of all sums if the finding is one of breach (which is not overturned on appeal), or the Member admits a breach

5.3 An indemnity cannot be provided, or insurance taken out, for:-

- conduct that is a criminal act (although an indemnity is allowed to defend criminal proceedings subject to repayment being made if the member/officer is convicted)
- fraudulent conduct
- any other intentional wrong-doing
- recklessness
- the pursuit of a defamation claim

THE INSURANCE POSITION

5.4 The Council's insurance policy with ZMI will automatically extend to activities of members and officers where the Council has the legal power to approve the activity and to support an appointment with a personal indemnity. This would therefore include liability arising from the appointment of members and officers to outside bodies, but there are some important exclusions.

5.5 Insurance cover is not available in the following instances:-

- (1) A Member has acted *ultra vires* unless a claim could also be made against the Council itself for the incident.

This is of most significance where a member exceeds their authority whilst acting on an outside body because it is less likely that the Council itself could have liability. The outside body may, however, have its own insurance.

- (2) Claims for financial loss unless the incident was caused by accidental error or omission and the member either acted upon the advice of an officer or acted in an executive capacity.

- (3) Claims brought by another party to a contract with the Council where the Council (i.e. an officer) has incorrectly stated that certain steps or requirements have been fulfilled.

This relates to breach of contract claims for which an officer could have personal liability. The Council is able to grant an indemnity where the statement was made in good faith, but insurance would not be available.

5.6 The Council has a number of options available, as follows:-

Option	Advantages	Disadvantages
1. Do not grant any indemnity	The Council has no potential financial liability.	Members/officers may be reluctant to undertake functions with a risk of personal liability. The liability may be covered by insurance, but would not be covered due to the absence of an indemnity.

Option	Advantages	Disadvantages
2. Grant an indemnity only so far as is fully covered by insurance	The Council has no potential financial liability.	Members/officers may be reluctant to undertake functions with a risk of personal liability. The Council would need to assess on a case by case basis whether insurance cover would in place and risks incorrect advice.
3 Grant a full indemnity	Members/officers have confidence that the Council has protected them to the full extent permitted by law	Potential financial liability to the Council. Additional insurance for Code of Conduct complaints may need to be purchased (approx £1,500)
4. Grant a full indemnity (excluding Code of Conduct complaints)	Avoidance of additional insurance premium	If members wished to be legally represented at a standards hearing then it would be at their cost.
5. Provide an indemnity on a case by case basis	The Council can assess in the given scenario whether to provide the indemnity	Delay for the member/officer whilst Council considers. Possibility that ZMI would refuse to bear costs if the indemnity was not in place at the time of the incident.

5.7 An indemnity for a standards investigation is likely to be of limited value. Firstly, costs must be reimbursed if a Member admits or is found to be in breach of the Code of Conduct. Secondly, a hearing only takes place if the investigating officer concludes that there is a breach of the Code. Thirdly, complaints are now handled and heard locally and only the most serious are considered by the former Adjudication Panel. In view of these factors, it is recommended that an indemnity be granted as per option 4.

5.8 A draft form of indemnity is at Appendix 1.

5.9 It is a legal requirement that a member/officer must reimburse any legal costs provided under an indemnity in defending criminal proceedings if the member/officer is subsequently convicted of an offence. For this reason, the member or officer would be asked to sign an indemnity agreement to provide the contractual right to recover the sums in such circumstances.

5.10 It is suggested that the indemnity encompass the following conditions:-

- it will not apply if liability is admitted by the member or officer, without the express consent of the Council to do so

- the Council reserves the right to take disciplinary action against an officer who has the benefit of an indemnity
- the member/officer must observe the requirements of the terms of the Council's policy of insurance where applicable
- the Council reserves the right, where appropriate and necessary to protect the interests of the Council under the indemnity, to take over the defence of any case involving the member/officer and to see any legal advice provided to the member/officer

5.11 The indemnity would continue in force after the retirement or resignation of a member/officer

6. **APPENDICES**

Appendix 1. – Draft form of Indemnity for Members and Officers

7. **BACKGROUND PAPERS REFERRED TO:**

Letters and e-mail communications with Zurich Municipal Insurance

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Indemnities for Members and Officers

1. The Council will, subject to the exceptions set out below, indemnify each of its members (including co-opted members of the Council) and officers against any loss or damage suffered by the member or officer arising from his/her action or failure to act in his/her capacity as a member or officer of the Council.

This indemnity will not extend to loss or damage directly or indirectly caused by or arising from:

- 1.1. any criminal offence, fraud or other deliberate wrongdoing or recklessness on the part of the member or officer;
 - 1.2. any act or failure to act by the member or officer otherwise than in his/her capacity as a member or officer of the Council, or
 - 1.3. failure by a member to comply with the Council's Code of Conduct for Members
2. The Council will, subject to the exceptions set out below, indemnify each of its members and officers against the reasonable costs which he/she may incur in securing appropriate legal advice and representation in respect of any civil or criminal proceedings to which he/she is subject.
 - 2.1. "Criminal proceedings" includes any interview or investigation by the Police, and any proceedings before a criminal court, in the United Kingdom.
 - 2.2. This indemnity shall not extend to any advice or representation in pursuit of any claim or threatened claim in defamation by a member or officer.
 - 2.3. Where any member or officer avails him/herself of this indemnity in respect of defending him/herself against any criminal proceedings, the indemnity is subject to a condition that if, in respect of the matter in relation to which the member or officer has made use of this indemnity –
 - 2.3.1 the member or officer is convicted of a criminal offence in consequence of such proceedings, and
 - 2.3.2 the conviction is not overturned on any appeal,the member or officer shall reimburse the Council for any sums expended by the Council pursuant to the indemnity

- 2.4. The requirement to reimburse in Paragraph 2.3 shall apply as if references to the Council were references to the Council's insurer.
3. For the purpose of these indemnities, a loss or damage shall be deemed to have arisen to the member or officer "in his/her capacity as a member or officer of the authority" where:
 - 3.1. The act or failure to act was outside the powers of the Council, or outside the powers of the member or officer, but the member or officer reasonably believed that the act or failure to act was within the powers of the Council or within the powers of the member or officer (as appropriate) at the time that he/she acted or failed to act, as the case may be;
 - 3.2. The act or failure to act occurred not in the discharge of the functions of the member or officer as a member or officer of the Council but in their capacity as a member or employee of another organisation, where the member or officer is, at the time of the action or failure to act, a member or employee of that organisation either –
 - 3.2.1. in consequence of his/her appointment as such member or officer of that organisation by the Council; or
 - 3.2.2. in consequence of his/her nomination for appointment as such member or officer of that organisation by the Council; or
 - 3.2.3. where the Council has specifically approved such appointment as such a member or employee of that organisation for the purpose of these indemnitiesand to the extent that that organisation does not have in place relevant insurance cover.
4. The Council undertakes not to sue (or join in action as co-defendant) a member or officer of the council in respect of any negligent act or failure to act by the member or officer in his/her capacity as an officer of the Council, subject to the following exceptions:
 - 4.1. Any criminal offence, fraud or other deliberate wrongdoing or recklessness on the part of the member or officer; or
 - 4.2. Any act or failure to act by the member or officer otherwise than in his/her capacity as a member or officer of the authority.
5. These indemnities and undertaking will not apply if a member or officer, without the express permission of the Council or of the appropriate officer of the Council, admits liability or negotiates or attempts to negotiate a settlement of any claim falling within the scope of the resolution.

6. These indemnities and undertaking are conditional upon compliance by the member or officer with the terms and conditions of the policy of insurance effected by the Council to cover its liability hereunder
7. These indemnities and undertaking are without prejudice to the rights of the Council to take disciplinary action against an officer in respect of any act or failure to act.
8. These indemnities and undertaking are subject to the right of the Council (or its insurer) where it considers it reasonable and necessary to protect the interests of the Council under this indemnity, to take conduct of the proceedings on behalf of the member or officer and to be provided with full details of any legal or other advice obtained by the member or officer.
9. These indemnities and undertaking shall apply retrospectively to any act or failure to act which may have occurred before this date and shall continue to apply after the member or officer has ceased to be a member or officer of the Council as well as during his/her membership of or employment by the Council.