



STAFF REPORT ACTION REQUIRED

Indemnification of City Council Members Serving on External Boards without City Approval

Date:	January 30, 2012
To:	Executive Committee
From:	City Manager
Wards:	City-wide
Reference:	

SUMMARY

This report recommends a protocol regarding indemnification of City Council members who sit on the boards of external bodies where there has been no appointment approved by the City. The protocol requires Council members to conduct due diligence before serving on an external board as part of their role as a Council member, including determining whether the external body has its own Director's Liability Insurance in place. In addition, any claims arising through Council members serving in a board member capacity must first be pursued through the insurance coverage of the external body.

This report has been prepared in consultation with the City Solicitor, the Chief Financial Officer & Deputy City Manager, and the City Clerk.

RECOMMENDATIONS

City Council require that:

1. City Council members, in considering whether to accept a membership on the board of an external body for which the City does not approve the appointment, or in continuing to participate as a board member with such bodies, follow the protocol in Attachment A of this report.
2. The City Clerk canvass City Council members to declare which external boards they sit on as representative of their constituents where they were not appointed by City Council and report the results of the declaration to the Executive Committee, and update the declaration annually;

3. Based on the declaration, the Chief Financial Officer & Deputy City Manager inform the City's insurer of the appointments to the external not-for-profit boards listed in the declaration so that the City's liability insurance in the amount of a maximum of \$5 million dollars per occurrence may be extended to the affected City Council members; and
4. Should a City Council member desire compensation for legal expenses or damages incurred as a result of their membership on the board of an external body where the City has not appointed them, and the external body's or the City's insurance has denied their claim in full or in part, the Council member may seek reimbursement pursuant to Section (2) of the City's Indemnification Policy for City Council members.

Implementation Points

The City Clerk will have to establish the business process for managing declarations from City Council members and keeping the database up to date, including confirmation that appointments were approved by the external board.

Financial Impact

There are no financial impacts from this report.

Decision History

Two Toronto City Council members sat on the Board of the North York Symphony Orchestra. They were not appointed by the City to the board. There was a dispute over unpaid wages owed to musicians and litigation ensued against the board, including the two Council members, to recover the wages. A judgement was awarded by the court against the Council members. At its February 2011 meeting City Council decided to pay for the legal expenses of the Council members after City Council determined that the Councillors were acting in their role as City Council members. The City Manager was requested by the Executive Committee at its January 2011 meeting to report, in consultation with the City Solicitor, on a policy for indemnification of City Council members who sit on external boards where they were not appointed by the City.

COMMENTS

1. Participation with External Bodies by City Council Members

From time to time City Council members receive requests to serve on the board of external bodies. Some of these bodies are formal organizations and are incorporated as not-for-profit entities and other bodies are informal with a mandate to promote a neighbourhood cause such as a gardening club, an annual community event, a local arts or cultural organization or a local community service organization. Council members are seen as an asset to the external body because Council members are opinion leaders, have a broad community social network, know how government works, and have a high public

profile in the community. The external groups view Council members as an influential asset that lends credibility to their organization.

City Council members also want to help the external organizations. The external bodies promote causes that make the City a better place to live and the Council member develops strong, positive relationships in the local community. Therefore, both the Council member and the external body benefit from the relationship. A Council member's participation in these bodies is left to their discretion as part of their role as a Council member, and is neither sanctioned nor prohibited by City Council. The appointment of City Council members to external bodies is separate and apart from the City Council approved appointment of Council members to the boards of the City's agencies and corporations and to the agencies of other levels of government.

The policies recommended in this report only apply to external bodies where binding decisions are made by the board. Therefore external ad hoc working groups or other groups that simply provide advice are not addressed in the policies recommended by this report. Examples of external groups excluded from this policy would be advisory or working groups established in the community to review development applications, parks improvements or local transit improvements.

2. The Role of City Council Members and Participation on External Boards

The City's insurer has agreed to indemnify Council members sitting on the board of external bodies when they are acting within their role as a City Council member to a limit of \$5 million per occurrence. If City Council members wish to sit on an external body without City Council approval, they should prior to accepting an offer of appointment, consider whether sitting on the external board is within their role as a City Council member. While there is no formal definition of the role of a City Council member there are some questions the City Council member should consider. They include:

- Does the mandate of the external body align with an issue of interest, regulation, or program scope of the City of Toronto?
- Does the participation with the external body fall within the role of the City Councillor to promote the Toronto public's interest?
- Does membership foster the Council member's role in representing constituent's interest or enhancing constituent awareness of City issues, policies and programs?

The *City of Toronto Act, 2006* helps define the role of the City and the City Council member. Section 8(2) of the Act outlines the kinds of areas and activities where City Council can pass by-laws. The City, amongst other things, may adopt by-laws respecting the economic, social and environmental well-being of the City, health, protection of persons and property, including consumer protection, safety and well-being of persons and services, and services or things that the City considers necessary or desirable for the public, therefore in the public interest. If a City Council member is on an external board where its mandate overlaps the interest or scope of matters within municipal interest, it

can be argued that participation on the external board is within the City Council member's role.

Another concept that helps define the role of a City Council member is found in the Ministry of Municipal Affairs guidebook for Municipal Councillors published in 2010. The guidebook indicates that Council members play representative, policy making and stewardship roles which sometimes overlap. A representative role means dealing with issues raised by ward constituents. The policy making role means making decisions that affect policies of the City. The stewardship role of a City Council member is ensuring that the regulatory, financial and administrative practices of the municipality are sound and are enforced. It is in the representative role that membership in external bodies will most likely fall, although involvement with external bodies could conceivably assist the Council member in performing their policy and stewardship roles.

3. A Protocol for Participating as a Director in an External Body

Attachment A outlines the recommended protocol for considering membership and participating on the board of external bodies. It provides three ways to ensure that claims for liability are covered. They are:

- Director's liability insurance provided by the external board;
- City liability insurance if coverage is not available from the external board; and
- The City's indemnification policy covering City Council members.

To help satisfy the requirements of the City's insurer, it is prudent for the City Council members to examine the following matters before accepting a board position on an external body where there is no appointment by the City. As much as possible they should document in writing their due diligence and require responses in writing from the organization.

The first step in the protocol is to ensure City Councillors conduct due diligence when they are asked to sit or otherwise participate on the board of an external body. Before accepting a position or participating as a board member, the City Councillor should:

- satisfy themselves that their position as a Council member on the board is within their role as a City Council member;
- request that the external body provide written proof and details of Director's Liability Insurance;
- consider whether the external body practices good governance habits such as recording of decisions, approval of board minutes, review of financial statements from management and audit results, transparent and methodical recruitment of board members, adherence to documented procedural policies for board meetings, conflict of interest and procurement of goods and services;
- assess whether the external board carries out typical governance activities such as setting a strategic direction for the organization, ensuring protection of assets, oversight of senior staff and organizational resources, approval of program

- delivery and budgets, monitoring program performance, and promoting the organization's public image; and
- satisfy themselves that the external body is for not-for-profit or charitable purposes and is not a for-profit activity.

As a second step in the recommended protocol the City Clerk will canvass City Council members to establish baseline data on which external bodies City Council members participate in a board member capacity. City Council members will be required to report their participation as board members of external bodies to the City Clerk by a specified time. A report will be submitted to the Executive Committee from the City Clerk listing the external bodies identified in the declaration. The City Clerk will update the data base annually by canvassing City Council members. The database will be used to inform the City's insurer of which external boards City Council members belong to and are to be named in the City's insurance coverage. Any claims made under the City's insurance coverage would follow the City Council approved Claims Administration Procedures and are to be reported immediately to the Manager of Insurance and Risk Management. It is important to emphasize, however, that the City's insurance only applies when the external body indemnifies the City Council member but their insurance fails to respond and when the City Council member's request to be insured by the external body is rejected or declined. Therefore should a claim be made against the City Council member they should first refer the claim to the external body using the director's liability insurance coverage of the external body for protection.

A third option, that should only be used as a last resort, when a City Council member does not declare their membership on an external board and then becomes liable for legal expenses/damages, is to seek reimbursement from City Council pursuant to Section 2 of the current City Indemnification Policy for City Council members. The indemnification policy requires Council members to bring a request for reimbursement forward to City Council for approval. In such cases the City Solicitor will examine legal expenses to ensure they are reasonable.

Director indemnification through the City's insurance would cover City Council members who sit on the external board, but not other board members, nor the external body itself. The indemnification would only apply to City Council members when the board of the external body makes binding decisions on behalf of the organization. Advisory bodies are excluded from this indemnification policy.

In summary, the protocol provides three layers of indemnification:

- director's liability insurance provided by the external body;
- the City's insurance coverage if the external body is named in the City's insurance policy and the Council member is acting within their role as a City Council member; and
- coverage of legal expenses/damages at the discretion of City Council pursuant to Section 2 of the City's indemnification policy for Council members provided City Council approves the request for reimbursement.

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SIGNATURE

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Attachment A: Indemnification Policy for City Council Members Serving on External Boards without City Council Approval

Indemnification Policy for City Council Members Serving on External Boards without City Council Approval

1. When asked to sit or participate on the board of an external body where City Council does not appoint them, City Council members, prior to accepting the appointment, shall conduct due diligence and shall:
 - (i) Review and consider whether the external body's mandate is within their role as a City Council member;
 - (ii) Request the external body to provide written proof and details of their director's liability insurance and confirm that the appointed City Council member is included as an insured;
 - (iii) Ensure that the external body has sound governance practices in that it follows rules of procedure, recording of decisions, adoption of meeting minutes at board meetings, and has adequate governance policies for matter such as conflict of interest and procurement of goods and services.
 - (iv) Determine that the external body is a not-for-profit body, whether formally incorporated or not; and
 - (v) Document answers provided to the questions asked of the external body, and where possible, have the external body provide adequate documentation.
2. Where a City Council member is not satisfied the criteria above are met, they are encouraged to decline the offer to sit as a member of the external board. Their refusal of the offer should be provided to the external body in writing.
3. Should the City Council member elect to sit on the board of the external body, the board shall be required to provide the Council member a board minute indicating that the Council member's appointment was approved, and the length of the term should be indicated. The City Council member shall forward the board minute to the City Clerk.
4. The City Clerk shall circulate an initial declaration form to City Council members to identify which external bodies City Council members sit on as a board member where there was no appointment by City Council.
5. City Council members shall complete the declaration and provide it to the City Clerk within the time period indicated by the City Clerk.
6. The City Clerk will submit a report to City Council through the Executive Committee indicating which external bodies have been identified as part of the declaration process.

7. Following City Council's consideration, the City Clerk will provide the list of external bodies created from the declaration to the Manager of Insurance and Risk Management who in turn will inform the City insurer of the external bodies on which City Council members sit as board members and were not appointed by City Council. The names of the City Council members and their appointments to external bodies will be added to the named insured in the City's insurance coverage to a limit of \$5 million per occurrence.
8. Annually, after the initial declaration, City Council members will be circulated a declaration form by the City Clerk in order to add/delete names of the external bodies on which they are a board member and where there was no appointment by the City.
9. When a claim is made by a City Council member in their role as a board member on an external body, they will first pursue the claim against the director's liability insurance of the external body. Only if the director's liability insurance of the external body will not cover the claim shall the City's insurance coverage be invoked through a claim by the City Council member using the City's Claims Administration Procedures by notifying the Manager, Insurance and Risk Management.
10. Where a claim is made against a City Council member in their capacity as an external board member and the City Council member has not named the external body as part of the declaration circulated by the City Clerk, the external body's insurance denies the claim, or the claim is not insurable under the City's insurance, the City Council member may request City Council to cover their legal expenses and/or damages pursuant to Section (2) of the City of Toronto's Indemnification Policy for City Council Members (EX 33.6, adopted by City Council on August 5, 2009)
11. For clarity, this policy only applies to City of Toronto Council members who are board members on external not-for-profit bodies that make binding decisions for their organizations, and excludes external bodies that are advisory or for-profit entities. The policy only applies to board members of the external body who are members of Toronto City Council, and not to other board members or the external body itself.