

GUIDANCE TO MEMBERS WHO SERVE ON OUTSIDE BODIES INCLUDING AS TRUSTEES AND COMPANY DIRECTORS

Introduction

This guidance is intended to help councillors understand their duties when appointed to outside bodies, and how to handle the conflicts of interest that can frequently arise. It is not a fully comprehensive guide, so if you have any queries, you can obtain further advice from the Monitoring Officer (Service Director: Legal & Governance) or any solicitors in the Corporate Legal team.

1. General

1.1 Membership on outside bodies can take various forms and it would be prudent to establish the capacity in which you are appointed. The first question is whether you are appointed by the Council, or in some other capacity. If you are not appointed by the Council to a particular position, you do not owe the Council any duties in relation to the way in which you carry on your membership of the outside body. However, the normal rules on declaring interests apply, and you will need to consider whether your role gives you a personal or pecuniary interest under the Members Code of Conduct in relation to any Council business. The remainder of this guidance covers the case where you are appointed by the Council.

1.2 If you are appointed by the Council, this may be either:

- a) as a member of the management committee, board of directors, or committee of as a trustee of the outside body. Here, you will not only be representing the interests of the council, but you will also have duties to the outside body and a role in its governance. If you serve in a decision-making capacity or have a position of general control or management on the outside body, whether company, trust or other association, you owe duties and responsibilities to that body which are separate and distinct from your duties owed to the council. On occasions, it is likely that duties owed to the outside body and to the council, will conflict e.g. If you are the treasurer of an outside body who has applied to the council for grant funding and the rest of this guidance gives more detail on this; or
- b) As an 'observer', or an ordinary member, or undertaking a monitoring role, facilitating exchanges of views or information as an extension of your council duties, but taking no part in the outside body's management or governance, other than to attend and vote at annual or general meetings. Here, you will be mainly concerned with representing the council and will not have responsibilities for governance of the body.

2. What sort of roles does this guidance apply to?

2.1 This guidance applies where you are: a director of a company in which the Council has an interest; a member of another authority; a trustee of a charity; or a member of the management board for an unincorporated body.

2.2 The various roles will give you responsibilities to the organisation, and to the Council in so far as you are fulfilling a role for the Council, and this creates potential conflicts.

2.3 Your responsibilities will depend on the type of body in which you become involved. In summary, the main types are as follows:

- a) **Companies:** Companies are separate legal entities. They are set up by their members, who may be either shareholders or guarantors. Liability of company members is limited to the value of their shares or by guarantee. Directors of companies have a duty to the company to act properly and in good faith. If not, they can incur personal liability, particularly if the company becomes insolvent. The activities and operation of companies are regulated by their Memorandum and Articles of Association, and also by company law.
- b) **Unincorporated Associations:** Unincorporated associations are informal organisations. The members regulate their relationship by agreement, such as a membership agreement or the rules of the club or association. Because the association has no legal existence separate from its members, the liability of the members is not limited. Each member can incur personal responsibility for liabilities incurred on behalf of the association, and relies on the membership agreement to be able to recover his/her costs from the other members.
- c) **Charities:** A charity is an organisation which
 - (i) is established for charitable purposes only, and
 - (ii) falls to be subject to the control of the High Court in the exercise of its jurisdiction with respect to charities.

Some companies and unincorporated associations are established for charitable purposes. A charity gains relief from corporation tax, VAT and business rates, but is subject to stricter regulation by the Charity Commissioners, to ensure that it is properly managed and that it is spending its money properly on the charitable objects. As a trustee of a charity, you have a duty to act in the best interests of the charity and can be personally liable if you breach that duty.

3. Some other key points to consider at the outset

- 3.1 Firstly, make sure you are given a clear statement of what is expected of you if you are going to be nominated. You should be able to obtain this from the organisation involved
- 3.2 **The duty to act in the interests of the outside body** - Being on an outside body can bring many benefits to the Council, the organisation and the community, but it will sometimes create conflicts with your work as a Councillor. For Council Members, it will have to be included as one of your interests in the Members' Register of Interests. You will have a personal interest in Council business referring to it, and sometimes a pecuniary interest where finances or regulatory matters are concerned. You will need to be sure that involvement with the organisation will not prevent you from fully participating in your work as a Councillor, particularly in areas that interest you, or, where you need to represent the community who elected you. This will depend on the nature of the body and type of involvement.
- 3.3 On the other hand, you will also need to make sure that you are able to commit enough time and attention to the organisation. You will want to make a meaningful contribution to their work too. If you cannot attend meetings very often, or are often conflicted out of participating, you will not be able to give the support that the organisation needs, and this will reflect badly upon the Council and upon you. It is best not to be appointed if you cannot participate fully.
- 3.4 **Conflict with your role as a councillor** - As a member of the organisation's management committee, as a director of a company, or as a trustee, you will not only be representing the interests of the Council, but you will also owe duties and responsibilities towards the organisation. You will have to exercise your own best

judgement in the best interests of the outside body and you cannot just take instructions from the Council although you may take account of the Council's wishes. Where the Council's wishes may conflict with the best interests of the outside body you must nevertheless, if taking decisions for that outside body, act in its best interests. **Therefore where the Council's interests and the outside body's interests conflict it is crucial not to involve yourself in the decision-making.**

- 3.5 **Indemnities** - Councillors who participate in external bodies may be indemnified in relation to liabilities they incur in that capacity, though this is subject to certain limitations, which are set out in more detail at paragraphs 8.1 to 8.4 below.

4. **Duties and Responsibilities of Councillors on Outside Bodies**

- 4.1 The following is a summary of the main duties and responsibilities of Councillors who are nominated by the Council to the most common types of outside body. The main principles of the obligations applying to company directors also apply to trustees and members of management committees. If you are in doubt about your duties and responsibilities, you may seek advice as above. In many cases, however, it will be more appropriate to seek advice from the advisers to the body involved, as they will have access to the rules and protocols of the body.

5. **Companies**

- 5.1 A company is a separate legal entity which can hold property in its own right, enter into contracts, employ staff and sue and be sued in its own name. The company is distinct from its members, who may be either shareholders or guarantors. The Council itself may be a member of the company, either a shareholder or guarantor.

- 5.2 If the body is a limited company, and you are asked to be involved, it is likely that you will be appointed as a company director. The duties of a company director are now set out in the Companies Act 2006, which codifies the existing common law and equitable principles. The management of a company is usually the responsibility of the Board of Directors. Directors' powers are usually set out in the company's Articles of Association. Another important document is the Memorandum of Association, which sets out the Company's objectives and powers.

- 5.3 The duties of a company director are not the same as your responsibilities as a Councillor. **Basically, when involved in company business, the company must come first.** Directors must act in the interests of the company, and not in the interests of other parties, including shareholders.

- 5.4 **Directors' Responsibilities** are:

- a) **To promote the success of the company**, A director's primary duty is to act in good faith, in the best interests of the organisation and its objects. All directors owe a fiduciary duty to their company, which means they owe loyalty to the company and a duty of care to act in the best interests of the company, having regard to the interests of the members or shareholders of the company, the company's employees, and creditors. This includes having regard to the likely long term consequences of decisions, the interests of employees, fostering relationships with suppliers and customers and others, the impact of operations on the community and environment, maintaining a reputation for high standards of business conduct, and acting fairly between members of the company
- b) **To exercise care, diligence and skill**, using your own knowledge, skill and experience, together with the care, skill and diligence which may reasonably

be expected of a person who is carrying out the functions of a director. So a director with significant experience must exercise the appropriate level of diligence in exercising their duties in line with their higher level of expertise. Although directors are not bound to attend all meetings of directors, attendance should be as frequent as possible and directors should ensure that they are reasonably informed at all times.

- c) **Not to exceed powers.** A company director must act in accordance with the company's constitution, and exercise powers for the purposes for which they were given.
- d) **To comply with the Companies Acts** in relation to the keeping of accounts, and ensure that the relevant returns are made to the Registrar of Companies. Failure to do so will incur fines and persistent default can lead to disqualification as a director.
- e) **To avoid conflicts of interest.** A director must avoid a situation in which he or she has, or may have, a direct or indirect interest which conflicts, or could conflict, with the interests of the company. This duty applies particularly to transactions between a director and a third party in relation to the exploitation of any property, information or opportunity.
- f) **To exercise independent judgement.** A director nominated by the Council cannot, for example, simply vote in accordance with the Council's instructions. To do so would be a breach of duty. The director must act in the company's interests.
- g) **Not to accept benefits from third parties.** A company director must not accept any benefit from a third party (whether monetary or otherwise) which has been conferred because of the fact that he or she is a director. This is based on the established principle that a director must not make a secret profit as a result of being a director. This duty applies unless the acceptance of the benefit cannot reasonably be regarded as likely to give rise to a conflict of interest.
- h) **To declare an interest in a proposed transaction or arrangement with the company.** A company director who has either a direct or an indirect interest in a proposed transaction or arrangement with the company must declare the 'nature and extent' of that interest to the other directors before the company enters into the transaction.

5.5 **Directors' Liabilities:** If a director fails to carry out his/her duties, action can be brought for breach of duty, either by the company itself, or by a liquidator if the company goes into liquidation, or with the consent of the court, by a shareholder. Such actions are unlikely where the company is properly controlled by the directors.

5.6 Some important considerations are:

- a) It is not always easy to reconcile the various factors which must be taken into account when reaching a major decision. The important thing as a director is to show that you are aware of and have taken account of the relevant factors, and have exercised due care and diligence in giving them all fair consideration.
- b) It may be difficult to be certain whether benefits may be regarded as giving rise to a conflict of interest. If you are unsure take advice from the company's advisers.
- c) Make sure you are aware of the company's constitution, its Memorandum and Articles of Association, so that you know what it can and cannot do. You must take this into account when making decisions, as well as any shareholder decisions that are relevant.

- d) Be diligent, and make sure you are well informed about the company's affairs. Make sure you are well briefed when taking up the role, and that you receive regular briefings throughout your term of office.
- e) Attend training and briefing sessions.
- f) Ensure insurance is in place.
- g) Some Board decisions may be reviewed on a future occasion. Make sure detailed minutes show that all necessary factors have been considered when major decisions are being taken. Obtain expert advice where necessary e.g. regarding impact of a decision on the environment. Take legal advice where there are doubts about a director's duty in relation to a particular matter.

5.7 Local Authority Controlled and Influenced Companies: There are special rules that affect companies in which councils have major interests. These are 'regulated' companies for the purposes of the Local Government and Housing Act 1989 and other Acts. They are in effect controlled by (more than 50% interest) or subject to a council's influence (20% interest plus business relationship) because of its level of interest, either individually, or with a group of other authorities. They will generally be subject to the local government capital finance regime and special propriety controls. However, so far as Members who are involved are concerned, there are some additional requirements that need to be complied with as follows:

- a) Remuneration that Councillors receive from the company should not exceed that received from a local authority for a similar role, and it should be declared.
- b) To provide information to Councillors about their activities as required by the local authority (unless it is confidential); and
- c) To cease to be a director immediately if disqualified as a Councillor.

6. Unincorporated Associations

6.1 "Unincorporated associations" have no separate identity from their members. The rules governing the members' duties and liability will be set out in a constitution, which is simply an agreement between the members as to how the organisation will operate. Usually the constitution will provide for a management committee to be responsible for the everyday running of the organisation. Management Committee members must act within the constitution, and must take reasonable care in exercising their powers. An unincorporated organisation may be charitable and may register as a charity.

6.2 If you are involved in a decision making capacity or have a position of general control or management on an unincorporated body, as the body has no separate corporate status, any liabilities will fall upon you personally. Councillors appointed to such bodies should familiarise themselves with the Constitution to understand the nature of their role, responsibilities and liabilities, and should assess the risk of personal liability, and the extent to which it has been covered by insurance.

7. Charities:

7.1 A charity is an organisation which operates for the public benefit and exclusively charitable purposes, either:

- the relief of poverty and human suffering
- the advancement of education
- the advancement of religion

- another purpose for the benefit of the community.

7.2 A number of useful publications are available on the Charity Commission's website at www.charitycommission.gov.uk. Publication CC3 - 'The Essential Trustee- What you Need to Know' is a useful guide <https://www.gov.uk/government/publications/the-essential-trustee-what-you-need-to-know-cc3>. Those who are responsible for the control and administration of a charity are referred to as its trustees, even where the organisation is a company limited by guarantee and even though they are not strictly trustees. A charity may also be unincorporated.

7.3 Trustees of a charity retain personal liability, and can only delegate to the extent that the constitution authorises them so to do.

7.4 **Charitable Trustees' Responsibilities** are:

- a) To act in accordance with the charity's trust deed or governing document.
- b) To protect the charity's assets.
- c) To comply with the Charities Acts, and the Trustee Act 2000.
- d) Trustees must not make a private profit from their position. They cannot receive remuneration without the sanction of the Charity Commission.
- e) To perform their duty with the standard of care which an ordinary, prudent business person would show. Higher standards are required of professionals, and in relation to investment matters.
- f) Charitable trustees must ensure that the information relating to the charity and trustees is registered with the Charity Commissioners and that annual accounts, reports and returns are completed and sent.
- g) Trustees are under a duty to ensure compliance with all relevant legislation (e.g. in relation to tax and land matters).

7.5 **Charitable Trustees' Liabilities:** Generally, a trustee may incur personal liability if s/he:-

- acts outside the scope of the trust deed
- falls below the required standard of care
- acts otherwise than in the best interests of the charity, in a way which
- Causes loss to the charity fund
- makes a personal profit from the trust assets

7.6 In such circumstances the trustee will be in breach of trust, and will incur personal liability for losses incurred. If in doubt, always consult the Charity Commissioners. You may avoid personal liability for breach of trust if you act in accordance with their advice.

7.7 Trustees can incur personal liabilities for contracts they enter into in the name of the charity. They will normally be entitled to be reimbursed from charitable funds for liabilities and expenses properly incurred by them. If the charity is a company, the trustees will be protected from liabilities incurred in the day-to-day running of the charity in the normal course of events, but will be personally liable if they commit a breach of trust, as stated above.

8. Indemnities

8.1 Councillors who participate in external bodies may be indemnified in relation to liabilities they incur in that capacity, though this is subject to certain limitations.

8.2 Indemnity by the outside body:

- a) **Directors:** Directors cannot be indemnified by the company against liability for negligence, default, breach of duty and trust. Companies can however purchase insurance to protect directors against claims of negligence, default, breach of duty and trust. Those appointed as directors should ensure that appropriate insurance is in place. Companies can, if their Articles of Association allow, provide for directors to be indemnified for the costs of defending such a claim if they are granted relief by the court or acquitted.
- b) **Trustees:** Provided a charitable trustee acts properly, and within his/her powers, indemnity can be given from the trust fund. Trustees can take out insurance to protect themselves from personal liabilities, but not for criminal acts such as fraud. If the premiums are to be paid out of the charitable funds, the consent of the Charity Commissioners will be needed.
- c) **Unincorporated Associations:** Members may be entitled to an indemnity if they act in accordance with the Constitution of the association, and are not at fault. However, regard must be had to the terms of the constitution. The constitution will determine whether insurance can be paid for by the organisation.

8.3 Indemnity by the Council: The Council may provide an indemnity where Councillors are acting on an outside body at the request of the Council, and provided:

- the appointment was made by the Council, or
- the nomination was made by the Council, and
- the appointment was specifically approved for the purpose of the indemnity.

8.4 The indemnity the Council can provide is subject to limitations. In general terms, if a Councillor is acting properly, within their powers and in good faith, the power to indemnify will usually apply. However, the Council cannot, for example, provide an indemnity in relation to any action or failure by any Member which constitutes a criminal offence, or for any action or failure by any Member which is the result of fraud, or other deliberate wrongdoing or recklessness on the part of the Member. When you are serving on an outside body, the Council's indemnity will only apply after any indemnity or insurance from the body itself. There are further limitations and it is advisable to be clear about the scope of the Council indemnity that may be available to you. You can seek further advice on indemnity from the monitoring officer.

9. Code of Conduct – Councillors' Interests

9.1 **Code of Conduct:** Under the Localism Act 2011 all Councillors are subject to the Council's Code of Conduct for Members. You will find a copy of the full Code in the Constitution and on the Council's web page. When Councillors act as representatives of the Council on another authority, they must comply with the other authority's Code of Conduct. However, when Councillors act as the Council's representative on any other sort of outside body, they must comply with the Council's Code of Conduct unless it conflicts with the lawful obligations of the other body.

9.2 The Register of Members Interests requires members to tell the Monitoring Officer in writing within 28 days of taking office, or within 28 days of any change to your interests, of any interests which fall within the categories set out in the Code of Conduct. These categories include your membership or position of control or management in any other bodies to which you are appointed or nominated by the Council. It is your duty to keep this up to date.

- 9.3 This means that if you are present at a meeting when an item of business arises which relates to or affects an outside body to which you have been appointed, you must declare that you have a personal interest, and the nature of that interest, before the matter is discussed or as soon as it becomes apparent to you.
- 9.4 An exemption applies where your interest arises solely from your membership of, or position of control or management on:
- any other body to which you were appointed or nominated by the authority
 - any other body exercising functions of a public nature (for example another local authority).
- In these exceptional cases, provided that you do not have a pecuniary interest, you only need to declare your interest if and when you speak on the matter.
- 9.5 You will also have a pecuniary interest in Council business affecting the outside body if:
- the matter being considered affects the financial position of the
 - outside body; or
 - relates to an approval, consent, licence, permission or registration
 - affects the outside body e.g. an application for planning permission.
- 9.6 If you have a pecuniary interest in a matter under discussion you must declare it. You must then leave the meeting room, unless members of the public are allowed to make representations, answer questions or give evidence about the matter. If that is the case, you can make your representations etc., but must leave the room immediately after doing so. The Code of Conduct supports your role as a community advocate and enables you, even with a pecuniary interest, to represent your community and speak on issues that are important to them and to you.
- 9.7 **Bias:** Where you might be inclined to the view that you have no pecuniary interest, your duties as a director, or trustee, or member of a management committee may well be regarded, on an objective appraisal, as giving rise to a legitimate fear of lack of impartiality, especially having regard to the desirability of maintaining public confidence. Participation in the decision making at a Council committee meeting by a Councillor who is biased potentially invalidates the decision. If you find yourself in this position or are concerned please seek legal advice as above before meeting as the law is complex regarding bias, predisposition and predetermination. Overall the rules of natural justice must prevail.
- 9.8 Where membership of the outside body is on an advisory or consultative basis, bias will not be assumed from mere membership. However, once the outside body has a line which is being advocated by you, this could potentially be viewed as bias, and the Council's decision on the issue could be vulnerable to challenge if you participate in those circumstances. It will depend on the facts, and in such circumstances advice should be sought as above.

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