

## GUIDANCE TO COUNCILLORS ON OUTSIDE BODIES

### 1. Introduction:

This guidance is solely intended for the purpose of providing general advice on the duties, obligations and liabilities that a Councillor will have if they are appointed to (or are on) an outside body. The guidance cannot provide a detailed answer for all circumstances and consequently, if in doubt, seek further advice from the Council's Monitoring Officer or Deputy Monitoring Officer.

### 2. General - Legal status of external organisations and implications for Councillors:

3.1. Councillors may participate in a variety of external organisations. In some cases, the Councillors will be appointed as a Director, or a Trust (or a representative). They will be expected to bring knowledge and expertise relating to the Council's Services and if appointed as a Director or Trustee will be expected (and indeed will have legal duties) to look after those bodies' interests and to further their aims, not the District Councils.

3.2. In all cases Councillors should: -

- Operate within the rules, and/or constitution of the outside body;
- Report back, *where appropriate*, to the Council or relevant Committee;
- Behave ethically and follow, as far as applicable, the NHDC Code of Conduct ('NHDC Code');
- Take an active and informed role in the affairs of the outside body. Councillors are not on an outside body to represent their political party.

3.3. There are a number of different types of outside body that a Councillor may become involved in, either independently or, as a representative nominated by the Council (in NHDC's case) to be appointed as a:

- Director;
- Trustee;
- Representative/ member.

3.4. Some of the most common examples of outside bodies are:

- Charitable Trusts;
- Company limited by shares;
- Company limited by guarantee;
- Unincorporated association (like a Panel, or Board).

3.5. The structure of each type of organisation, the management and the rules that govern them will vary. However, there are a number of duties that will apply to the bodies concerned and these are dealt with below (sections 4-7).

3.6. In carrying out their duties as a Director, Trustee or Representative/member, Councillors must take decisions without being influenced by the fact that they are a Councillor. Their primary duty as such is to make these decisions in the interests of the organisation.

2.8 Councillors should bear in mind these various roles and the conflict that may arise and should consider this Guidance in conjunction with their responsibilities under the NHDC Code of Conduct.

## GUIDANCE TO COUNCILLORS ON OUTSIDE BODIES

### 3. Code of Conduct & lawful decision making:

#### **NHDC's Code:**

- 3.1 This Guidance should be read in conjunction with the NHDC's Code (in [Constitution Section 17](#)). The external body's Code or governance documents are also likely to legally bind a Councillor and a Councillor should be advised to abide by these (*which is also a requirement under paragraph 2.3 of the NHDC Code*).
- 3.2 If that body does not have a code, then a Councillor you must follow the NHDC Code when acting for that external body, **unless it conflicts with any other lawful obligations** that applies to that body (or the duties that a Councillor owes – see below).
- 3.3 As Councillors are aware, the NHDC Code applies to any “meeting” of the Council (Council, Cabinet, individual Executive, Committees, Sub-Committee, Joint Committees **or informal Council meetings** with other Members or Officers.)<sup>1</sup>, whenever business is conducted or Councillors are present at a meeting, or Councillors act, claim to act or give the impression they are acting in that role [*for full/ further details see paragraph 2.2 of the NHDC Code*].
- 3.4 When a Councillor acts as a Trustee or Director of a company or Trust, they may have a **Disclosable Pecuniary Interest ('DPI')**<sup>2</sup> in an item of business of the Council, **if the role they have been appointed to is carried on as employment, office, trade, profession or vocation for profit or gain**. A full list of DPIs is appended to the NHDC Code (and is set out in the Regulations<sup>3</sup>). As per the statutory instruments explanatory memorandum:  
*“These are the interests that are considered **most likely to lead to a conflict of interests** if a member's interest was related to the business of the authority that the member was taking part in. **By having the member declare such interests and as a consequence having their ability to take part in related business of the authority curtailed, it gives the public assurance that local authority members are not putting their own interests ahead of those of the public.**”*
- 3.5 If this is a DPI then in summary it needs to be declared to the Monitoring Officer, should be put on the register of interests, be declaration at meetings where relevant related business is discussed and the Councillor should leave the meeting (as per paragraphs 4.3, 4.4, 6.1, 7.1 & 7.2 of the NHDC Code). **Note** it may be possible to obtain a ‘dispensation’ from the Monitoring Officer to remain in a meeting where a Councillor has a DPI – but this is not automatically granted and cannot be retrospective. Therefore any request/ application for a dispensation must be made well in advance of a meeting the Councillor would like to attend.
- 3.6 If you are a Director or Trustee and *this is not a pecuniary interest*, then under the NHDC's Code it is likely to be a **Declarable Interest** in an item of business of the Council, if under paragraph 4.6 (a) of the NHDC Code:  
*“a decision in relation to that business might reasonably be regarded as affecting the well-being or financial standing of..[a] body with whom you have a close*

<sup>1</sup> Paragraph 2, 2.1 of the NHDC Code.

<sup>2</sup> The Relevant Authorities (Disclosable Pecuniary Interests) Regulations 2012  
<http://www.legislation.gov.uk/uksi/2012/1464/contents/made>

<sup>3</sup> Ibid.



## GUIDANCE TO COUNCILLORS ON OUTSIDE BODIES

*association to a greater extent than it would affect the majority of the Council Tax payers, ratepayers or inhabitants of the ward for which you have been elected or otherwise of the Council's administrative area"; or*

*"(b) it relates to or is likely to affect any of the interests listed" in the DPI Regulations in respect of that body with whom you have a close association; or*

*"(e) it relates to or is likely to affect any body of which you are a member or in a position of general control or management which:*

*(i) you are appointed or nominated to by the authority; or*

*(ii) exercises functions of a public nature; or*

*(iii) is directed to charitable purposes; or*

*(iv) as its principal purposes includes the influence of public opinion or policy (including any political party or trade union)*

*and that interest is not a Disclosable Pecuniary Interest."*

- 3.7 In short a Councillor who sits on an outside body (either one nominated to by the Council or independent of this nomination) is likely, **at the very least**, to have a Declarable interest. Therefore if a relevant item of business comes to the Council – serious consideration has to be given as to whether a Councillor can participate in that meeting and if unsure should seek advice *before* the meeting.

### **Lawful decision-making:**

- 3.8 Local authority decision-making must be unbiased, reasonable, lawful and proportionate, in addition to the requirement on a Councillor to comply with the NHDC Code.

- 3.9 A Councillor may be subject to sanctions for breaching the NHDC Code and also expose NHDC to challenge if, for example, s/he takes a biased decision or he has determined the matter before it has been properly discussed (predetermination).<sup>4</sup> When undertaking Council business, a Councillor must ensure that they are not biased or seen to be biased towards the outside body they represent. A Councillor can legitimately be predisposed to a particular outcome or decision. However, a Councillor must make sure that they approach all Council decision making with an open mind and not having predetermined the outcome.

### **Confidentiality:**

- 3.10 Some outside bodies may require the Councillor to treat the body's business as confidential. This may sometimes create a dilemma for the Councillor and may seem contrary to the idea of assisting public accountability. However, Councillors will have to bear this confidentiality requirement in mind and consider how that fits in with the duties to the Council, residents and those detailed below.

## **4. The Duties of a Director:**

### **Compliance with the Companies Acts/ other requirements:**

- 4.1. Directors owe a number of duties to their company under statute and common law. The Companies Act 2006 introduced a partial codification and framework for Directors' which consolidated the vast majority of these duties.

<sup>4</sup> Although the rules on predetermination have been clarified by section 25 of the Localism Act 2011.

## GUIDANCE TO COUNCILLORS ON OUTSIDE BODIES

- 4.2. These duties apply to both Executive and Non-Executive Directors. In general whether nominated or not to the external body a Councillor should ensure that they are aware of these duties and comply with them, as failure to do so *could* lead to:
- A conflict with their role as a NHDC Councillor (for example, the duties to promote the success of the company, to exercise independent judgement, and to avoid conflicts of interest). And/ or
  - Personal liability (fines, liability for the debts of the company and in serious cases - disqualification as a Director or prosecution).

- 4.3. These duties, in summary, are to:
- Act within powers (act legally).
  - Promote the success of the company.
  - Exercise independent judgement (duty to act for the company).
  - Exercise reasonable skill, care and diligence (Requirement for appropriate level of skill and expertise).
  - Avoid conflicts of interest.
  - Not accept personal benefits from third parties.
  - Declare a personal interest in a proposed transaction/arrangement with the company.

These are explained in more detail below.

***Act within powers:***

- 4.4. Directors are under a duty under section 171 of the Companies Act 2006, to see that they do not act beyond the powers of the organisation. They must ensure that they do not exceed the powers conferred on them by the company's constitution (its Memorandum and Articles of Association). If they do so, they will be acting illegally.
- 4.5. Third parties acting in good faith can rely on decisions made by Directors acting outside of their powers, *but the company may recover any resulting loss from the Director personally*. The members of a company may ratify a Director's breach of duty under section 239 of the Companies Act 2006 – but this is subject to certain limitations and it is better not to have to rely on post-decision approval.

***Promote the success of the company:***

- 4.6. Under section 172 of the Companies Act 2006, the Councillor as a Director owes a “fiduciary” duty to the company (which means loyalty to the company and a duty of care to act in its best interests, having regard to the interests of the members, shareholders, employees and creditors).
- 4.7. The Director must consider what would promote the success of the company and have regard to the likely consequences of any decision in the long term. If the Councillor believes he is unable to do this without compromising his/her role as a Councillor and the interests of the residents of the District then serious consideration should be given to resigning the post. This should be discussed with the Monitoring Officer and thought given to if/how these differing duties can be managed under the Council's Guidance document “**Managing Conflicts in Organisational Roles & Duties**”.

## GUIDANCE TO COUNCILLORS ON OUTSIDE BODIES

### ***Independent judgement:***

- 4.8. The Director is under a duty to exercise independent judgement under section 173 of the Companies Act 2006 i.e. they should not fetter their discretion by simply voting in accordance with a Council mandate. If the Councillor is a Director of the company and a mere channel for the local authority's viewpoint, the local authority is also a risk of being held to be a shadow Director of the company (which can have ramifications if the company is for example, trading insolvency situation). It may be possible, nevertheless, to take into account the interests of a third party body – *so long as this is disclosed and the company's Articles of Association allows the Councillor to do so.*

### ***Reasonable skill, care and diligence:***

- 4.9. Under section 174 of the Companies Act 2006, a Director must exercise the care, skill and diligence which would be exercised by a reasonably diligent person with both:
- The general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the Director in relation to the company (the "**objective**" test).
  - The general knowledge, skill and experience that the Director actually has (the "**subjective**" test)<sup>5</sup>.
- 4.10. *So, at a minimum, a Director must display the knowledge, skill and experience set out in the objective test, but where a Director has specialist knowledge (for example they are or were a lawyer or an accountant), they must meet the higher subjective standard.*
- 4.11. When acting in this capacity, a Councillor is expected to act within their own knowledge/ skill *and seek expert advice when necessary* (i.e. exercise due diligence). Ideally, therefore, any Councillor appointed to such a role should have sufficient knowledge and skill to be nominated for that role and if they have specialist skills, to be aware that *they have a duty to the company to apply those skills to their role as Director.*

### ***Avoid conflicts of interest:***

- 4.12. There is a legal duty for Directors to avoid conflicts of interest under section 175 of the Companies Act 2006. There may be actual or potential conflicts between the interests of the Council and the interests of the company. In such circumstances it would be inappropriate for the Councillor to take part in discussions upon such topics both as a Councillor and as a Director. If the conflict is a serious one or repeatedly presents itself then it may be appropriate for the Councillor to resign as a Director of the company. If the Councillor has an interest in the proposed transactions, a declaration must be made of the nature and extent of such an interest. This may cover both the Councillor's own interests as well as those of the Council where there is a conflict. Whether the Councillor is allowed to participate in the latter case will depend on the company's governance documents.
- 4.13. On a practical basis this type of conflict can and has arisen in dealings between the Council and bodies - for issues such as contracts and Leases. A Councillor who is a Director of an external body must consider this type of conflict and how to deal with it, to prevent a breach of the Companies Act duty and their duty as a Councillor.

<sup>5</sup> More recently this test is said to mirror the s214 Insolvency Act 1986 wrongful trading objective test.

## GUIDANCE TO COUNCILLORS ON OUTSIDE BODIES

***Duties to declare an interest in a proposed transaction/ arrangement & not accept a benefit from a third party:***

- 4.14. Directors have legal duties under sections 176 and 177 not to make a private profit from their position or accept benefits from a third party. They must not allow personal interests to conflict with those of the organisation. They must therefore disclose any interests they or their family have in relation to the company's contracts.

***Financial Responsibility/ liabilities that may arise from an insolvent company:***

- 4.15. Directors have a duty to ensure that the company operates within the limits of its financial resources, actual and expected. Even if a company has limited liability, Directors can incur personal liability for its debts and obligations<sup>6</sup> if they continue to trade when they knew, or ought to have concluded, that there was no reasonable prospect that the company would avoid going into insolvent liquidation or insolvent administration.

- 4.16. Directors can also be held personally liable if they have allowed a company to operate, or continue to operate, where there was no reasonable prospect that it could pay its debts, and these are left unpaid after the liquidation of the company. It follows that Directors must pay scrupulous attention to their company's present and future liquidity, and ensure that their concerns and actions are minuted by reviewing/ scrutinising the company's accounts. Guidance on Liquidation and insolvency can be found on the Gov.uk Companies House website [Liquidation and insolvency \(GPO8\)](#)

***Other responsibilities:***

- 4.17. Directors must also be aware of how acts and decisions of other may bind the company, for example:
- An employer (the company) has vicarious liability for the tortious acts of employees carried out in the course of their employment. This can include, for example breaches of health and safety.
  - The same rules apply to unincorporated associations, although in those cases the individual Councillor or Councillors will be the employer rather than the company.
- 4.18. Directors should also be aware that the company, or Councillors, may also owe duties to relevant Regulators, including, *as appropriate* the:
- Homes and Communities Agency (HCA).
  - Local authorities.
  - Information Commissioner.
  - Financial Conduct Authority.
  - Charity Commission.
  - Registrar of Companies.
  - Health and Safety Executive.
  - Ombudsman (where the body is discharging a public function).

## **5. Charitable Trustees/ Trustees**

- 5.1. Those who are responsible for the control and administration of a charity are referred to as Trustees; this is the case even where the organisation is a company limited by guarantee and they are not strictly speaking Trustees. If the organisation is a charitable company, then a Trustee Councillor will also be bound to act in accordance

<sup>6</sup> Under the 'wrongful trading' provisions ss 214/ or 246ZB of the Insolvency Act 1986.

## GUIDANCE TO COUNCILLORS ON OUTSIDE BODIES

with the principles in 4 above as well as those below. Some of the Trustee duties are, however, very similar to those of a Director.

- 5.2. These general duties, in summary, are:
- Fiduciary (loyalty to the Trust and a duty of care to act in its best interests, having regard to the interests of the beneficiaries, employees and creditors this applies to all types of Trustee, regardless of the legal structure).
  - To promote the charity's purposes (ie act in accordance with the governing documents - Trust deed/ keep the objects under review and to protect the charity's assets. Trustees are also responsible for compliance with the Charities Acts and the Trustee Act 2000).
  - For Public benefit (operate their charity for the benefit of the public, have regard to The Charity Commission guidance on this and if a registered Charity, report this to the Commission).
  - Undivided loyalty to the beneficiaries of the charity (no-profit and no-conflict rules).
  - Act in good faith (genuine, honest intention or motive).
  - Act within powers (These powers derive from the charity's governing document, together with any statutory provisions or case law that applies to the legal structure of the charity. In practice Councillors should ensure they are provided or have seen the up to date documents on appointment).
  - Prudence (to carry out his duties according to the standards of an ordinary prudent business person).
  - Act collectively (all Trustees are collectively responsible for decisions that have been validly made by them – even if a Trustee was absent from the meeting at which the decision was made – so Trustees should take an active role in making decisions by critically and objectively reviewing proposals and challenging assumptions).
- 5.3. In addition a Trustee must ensure (if the charity is registered) that the information relating to the Trust and Trustees is registered with the Charity Commissioners and that the annual accounts and return are completed / filed. The Charity Commission provides a number of useful guidance documents – see:
- The essential trustee: what you need to know and what you need to do: <https://www.gov.uk/government/publications/the-essential-trustee-what-you-need-to-know-cc3>
  - The Hallmarks of an effective charity: <https://www.gov.uk/government/publications/the-hallmarks-of-an-effective-charity-cc10>
  - It's your decision: charity trustees and decision making: <https://www.gov.uk/government/publications/its-your-decision-charity-trustees-and-decision-making>
  - Charity Commission: Charity trustee meetings: 15 questions you should ask: <https://www.gov.uk/government/publications/charity-trustee-meetings-15-questions-you-should-ask>

## GUIDANCE TO COUNCILLORS ON OUTSIDE BODIES

### **6. Non-corporate/ unincorporated associations**

- 6.1. Groups, which are neither limited companies nor charitable trusts, may be “unincorporated associations” which have no separate identity from their members. The rules governing the Councillor’s duties and liabilities will (or should) be set out in the organisation’s constitution, which is simply an agreement between members as to how the organisation will operate.
- 6.2. Usually the organisation’s constitution will provide for a management committee to be responsible for the everyday running of the organisation. Management committee members must act within the organisation’s constitution and must take reasonable care when exercising their powers.
- 6.3. Appointments to non-corporate organisations (which can cover some trusts) are more risky, as the absence of a “corporate veil” means that a Councillor may, as a member of the body, be personally liable for claims against the unincorporated organisation if it has insufficient assets to meet any legal responsibility.

### **7. Local authority participation in partnerships:**

- 7.1. Arrangements between local authorities and other bodies are often described as partnerships. However, a true partnership is governed by the Partnership Act and any partner is “jointly and severally” liable for any liabilities incurred by any other partner. That partner may be able to recover all or some of those losses from the other partners under the partnership agreement. Such liability can be limited for limited partners in a Limited Partnership and for partners in a Limited Liability Partnership. This is the reason why local authorities avoid appointments to ordinary partnerships and other ones will generally be covered as part of the Councillors normal duties/ they should have statutory immunity and will be covered by the Council’s normal insurance and indemnity – see below.

### **8. Liability issues (immunity, insurance and indemnity):**

- 8.1. Where a Councillors (or indeed employees) act within/ for their own local authority, within their powers and acting in good faith, they have statutory immunity against personal liability under section 265 of the Public Health Act 1875. This section prevents any action being brought against Councillors and employees (in contrast with an indemnity, which seeks to compensate the beneficiary against any loss resulting from a successful claim). However, it cannot be relied upon where the Councillor has acted outside of the Council’s powers (ie is ‘ultra vires’).
- 8.2. If the statutory immunity does not apply then a Councillor will generally be covered as the Council has specific legal powers to insure<sup>7</sup> and offer an indemnity<sup>8</sup>. This will be for any action of or failure to act which is authorised by NHDC or forms part or arises from any powers conferred or duties placed upon the Councillor as a consequence of any functions being exercised by that Councillor:(i) at the request of, or with the approval of NHDC, or (ii) for the purposes of NHDC.

<sup>7</sup> S111 Local Government Act 1972.

<sup>8</sup> Local Authorities (Indemnities for Members and Officers) Order 2004/3082





## GUIDANCE TO COUNCILLORS ON OUTSIDE BODIES

- 8.3. Statutory immunity does not apply where a Councillor acts on an outside body, so the issue of personal liability is very real. Broadly, incorporation creates a “corporate veil” between the liabilities of the corporate body, for example a company, and its shareholders (the members) and employees. In most circumstances, therefore, the corporate veil means that a company can fail, owing creditors large sums of money, without affecting the Members and Directors. However, in certain circumstances, Directors are held responsible for a company's liabilities.
- 8.4. In cases where Councillors act in as a Director or Trustee specifically in connection with the business of the outside body, then they will be regarded as serving the particular body rather than the Council, then that body should insure / and or agree to indemnify the Councillor as part of the arrangements in place.
- 8.5. ***Councillors should note:*** The Council's insurance cover will extend to Councillors and Council officials assisting outside organisations as advisers or observers, either facilitating exchanges of views or information as an extension of their Council duties or otherwise representing the Council, but the Council's insurance cover does not extend to indemnify Councillors and officials who serve in an executive capacity on an outside body. So if you are a Trustee or Director on another body you should check that you are covered by their insurance/ indemnity policy.
- 9. Administration and Contact Details for Councillors:**
- 9.1. Committee Services are leading on the administration and record keeping relating to Members nominated to Outside Bodies.
- 9.2. Committee Services will be in contact annually near the end of each Civic Year to receive your Report for recording on the Outside Bodies Information Sheet.
- 9.3. If further advice is required, please contact the Monitoring Officer on 01472 474588 or Deputy Monitoring Officer on 01472 474370.

June 2016.