

Appendix 18 - Guidance to Councillors and Officers Appointed to Outside Bodies

1 Introduction

- 1.1 This guidance sets out the main issues which Councillors and Officers should consider when appointed by the Council to serve on outside bodies.
- 1.2 In the context of this guidance 'outside bodies' include trusts, companies, charities, school governing bodies, industrial and provident societies and community associations. Councillors or Officers may be involved as a director, trustee, governor or member (with or without voting powers).
- 1.3 Councillors and Officers who are involved in the management of outside bodies have responsibilities to that body that must be acted upon. Their role, responsibilities and potential liabilities will depend upon the legal nature of the organisation and the capacity in which they have been appointed. Failure to act in a proper manner may give rise to personal liability or liability for the Council.
- 1.4 With the increasing emphasis on partnership working, Councillors, as community leaders, have an important role to fulfil in supporting and advising outside bodies. However, this can give rise to conflicts of interest, particularly where the organisation is seeking or receiving funding from the Council. Councillors and Officers always need to be clear about their roles and be alert to potential conflicts of interest in order to ensure transparency and public confidence in local democracy.
- 1.5 The purpose of this guidance is to assist Councillors and Officers in the discharge of their responsibilities on outside bodies clearly and effectively. It covers, primarily, the position of Councillors and Officers appointed by the Council to serve on outside bodies, though much of the advice applies equally to Councillors and

Officers who are involved with outside bodies in a private capacity. In those situations, however, the Council's insurances will not apply.

- 1.6 This guidance is general and Councillors and Officers should contact the Monitoring Officer for further advice if they have any particular issues of concern.

2 Issues to consider before appointment

- 2.1 Before accepting an appointment to an outside body Councillors and Officers should check the following:

- a) The legal status of the organisation, e.g. company, trust, charity, unincorporated association;
- b) The capacity in which the Councillor or Officer is to be appointed, e.g. director, trustee,
- c) Whether the Councillor or Officer will have voting rights or observer status;
- d) The purpose of the organisation and how this relates to the Council's functions and objectives;
- e) The relationship between the Council and the body and the likelihood and extent of any conflicts of interest;
- f) The requirements of the organisation's governing instrument, e.g. constitution; trust deed; memorandum and articles of association, both as a member and generally;
- g) The financial status of the organisation;
- h) governance and decision-making arrangements, including the management of risk;
- i) Any code of conduct for members of the outside body;
- j) Any potential liabilities;
- k) Extent of any insurance cover for members of the outside body.

- 2.2 Having checked the above, Councillors and Officers should consider carefully whether they are willing to be appointed to participate formally in the management of the external organisation

e.g. as a director, trustee or voting member, or whether their role as a representative or Officer of the Council may be more effectively discharged as a non-voting member with observer status only. Bearing in mind the potential liabilities that may be incurred through formal involvement in an organisation, Councillors and Officers are generally advised to seek appointment as members with observer status only, unless there are exceptional reasons for more formal participation.

- 2.3 Councillors and Officers are encouraged to seek advice from the Monitoring Officer where any of the above issues are unclear.

3 Application of the Council's Code of Conduct for Members

- 3.1 The Council's Code of Conduct for Members at Appendix 14 and the Council's Code of Conduct for Officers at Appendix 15 of the Constitution, place specific obligations on Councillors and Officers when acting in that capacity in their dealings with outside organisations. The Code will, in particular, apply where a Councillor or Officers is acting as a representative of the Council on an outside body.
- 3.2 Apart from the general duty to promote and support high standards of conduct, the following duties of the Code are particularly relevant in this context:
- a) act solely in the public interest and never improperly confer an advantage or disadvantage on any person or act to gain financial or other material benefits for yourself, your family, a friend or close associate;
 - b) Avoid placing yourself under a financial or other obligation to outside individuals or organisations that might seek to influence you in the performance of your official duties;
 - c) Make all choices, such as making public appointments, awarding contracts or recommending individuals for rewards or benefits, on merit;

- d) Declare any private interests, both pecuniary and non-pecuniary, that relate to your public duties and take steps to resolve any conflicts in a way that protects the public interest.
- e) Comply with the statutory requirements on the registration and declaration of interests.

3.3 Councillors and Officers who have a direct or indirect disclosable pecuniary interest in any business at a meeting of the Council, e.g. award of a contract, must not participate in any discussion of the matter or, in the case of a Councillor, vote on it, unless a dispensation has been obtained. Failure to comply with these requirements without reasonable excuse may result in prosecution.

3.4 Councillors and Officers who serve on more than one body, in particular, need to be mindful of potential conflicts of interest and always act in an open and transparent manner in carrying out their respective roles. For example, where a Councillor is at a council meeting considering an application for a grant or a community asset transfer request from a parish council or other public body of which they are a member, they should declare the existence and nature of their interest. Having done so, they may, generally, take part in the discussion of that item and vote, unless there are particular reasons why this would not be appropriate. It is also advisable as a matter of transparency, to include details of the interest in their register of interests.

3.5 The same principle will generally apply where Councillors are appointed to serve as school governors, but it is always necessary to have regard to the nature and extent of any conflict of interest in deciding whether to participate or vote. Where the governing body is considering a matter which is likely to have a material effect on the Councillor or a member of their family, it would be advisable to declare an interest and take no further part in the proceedings.

- 3.6 Councillors and Officers appointed to serve on outside bodies should be mindful of their legal obligations regarding disclosure of confidential information and in case of doubt should seek advice from the Monitoring Officer.

4 Predetermination and Bias

- 4.1 Aside from the Code of Conduct, under common law, Councillors must be careful to avoid any pre-determination or bias in their decision-making. Predetermination occurs where someone has a closed mind so that they are unable to apply their judgement fully and properly to the issue requiring a decision. This can lead to legal challenges and decisions being set aside.
- 4.2 The Localism Act 2011 clarified the rules on predetermination. It makes it clear that a Councillor is not deemed to have had a closed mind on an issue just because they have indicated what view they have taken or may take before the issue is decided. A Councillor is not, for example, prevented from participating in discussion of an issue, or voting on it, if they have campaigned on the issue or made public statements about their approach to it.
- 4.3 The general position remains however, that, whatever their views, members must approach their decision-making with an open mind in the sense that they must have regard to all material considerations and must be prepared to change their views if persuaded that they should.
- 4.4 Councillors need to be aware that decisions may be challenged and set aside on the grounds of bias. Under common law, bias involves some element of partiality or personal interest in the outcome of a case, as a result of a close connection with the parties, or the subject matter of the dispute, or because of a tendency towards a particular shared point of view.

- 4.5 The relevant test for bias is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the decision-maker was biased. The risk of a successful challenge on these grounds may be overcome by proper observance of the requirements of the Code of Conduct and particularly the provisions set out above.

5 Legal status, capacity, duties and liabilities

- 5.1 Where a Councillor or Officer is appointed to an external organisation by the council, the Councillor or Officer will be representing the interests of the Council. However, they will also have duties to the organisation. The extent of these duties will depend on the type of organisation and the nature of the position that the Councillor or Officer is appointed to.
- 5.2 If the Councillor or Officer is serving in a decision-making capacity, or has a position of management or control on the external organisation, they will owe duties to that organisation that are distinct and separate from their duties as Councillor or Officer.
- 5.3 In contrast, where the Councillor or Officer is appointed to an external organisation as an observer only and is not required to participate in the organisation's management or governance other than to attend and vote at annual or general meetings, it is likely that the Councillor or Officer will, for the most part, be acting as a representative of the Council and would not have the same duties in respect of the governance of the organisation referred to above.
- 5.4 The specific responsibilities of Councillors and Officers will depend upon the legal status of the outside body and the capacity in which they have been appointed. The position of Councillors and Officers in relation to various types of outside body, is summarised in the appendices to this note as follows:

- Appendix A - Director of Limited Liability Company

- Annex 1 – Summary - Executive, Shareholder Committee and Companies
- Appendix B - Trustee of Trust or Charitable Trust
- Appendix C - Member of Unincorporated Association
- Appendix D - Member of Steering Group, Joint Committee or Partnership Body

5.5 The key point to note, is that where Councillors or Officers are carrying out their duties as a trustee, director, or management committee member, they may take account of the wishes of the Council, but their primary duty is to act in the best interests of the organisation to which they have been appointed.

6 Liability, Insurance and Indemnity

6.1 Councillors and Officers can incur personal civil and criminal liability from formal participation in outside bodies. However, under section 265 of the Public Health Act 1875 (as applied by Section 39, Local Government (Miscellaneous Provisions) Act 1976), Councillors and Officers enjoy statutory immunity from civil liability where they act within the powers of the authority, in good faith and without negligence.

6.2 This immunity does not apply however, where they act beyond the powers of the council or act in bad faith (i.e. with dishonest or malicious intent) or negligently, and it does not protect them from criminal liability, for example for fraud where they exercise managerial responsibilities.

6.3 City of York Council has a wide insurance provision to protect its assets and liabilities. Within these provisions the Council has extended its cover to protect its elected and co-opted members of outside bodies when carrying out duties in connection with the business of the Council. Those afforded the protection are:

- a) Elected Members of the Council or co-opted members of any Committee or Sub-Committee;
- b) Members of committees, schemes or associations formed to assist in the activities of the Council.

6.4 Further assistance on the issues covered in this guidance may be obtained from the Council's Monitoring Officer.

Appendix A – Duties and Responsibilities of a Director of Limited Liability Company (both Teckal and Non-Teckal)

1 Directors Duties

1.1 Directors owe a number of duties to their company, which are set out in the *Companies Act 2006*. These duties are to:

- a) Act within powers (*section 171*) - see paragraph 2 '*Acting within powers - Consequences of exceeding authority*'.
- b) Promote the success of the company (*section 172*).
- c) Exercise independent judgement (*section 173*) - see paragraph 3 '*Duty to act for the company and risk of local authority becoming a shadow director*'.
- d) Exercise reasonable skill, care and diligence (*section 174*) – see paragraph 4 '*Requirement for appropriate level of skill and expertise*'.
- e) Avoid conflicts of interest (*section 175*) – see paragraph 5 '*Avoid conflicts of interest – Council vs Company*'.
- f) Not accept benefits from third parties (*section 176*).
- g) Declare interest in a proposed transaction or arrangement with the company (*section 177*).

1.2 Councillors and Officers appointed as directors should be aware of these duties, particularly those which could lead to:

- a) A conflict with their role as a Councillor or Officer (for example, the duties to promote the success of the company, to exercise independent judgement, and to avoid conflicts of interest).
- b) Personal liability for the debts of the company.

2 Acting within powers - Consequences of exceeding authority

2.1 Directors must ensure that they act within the company's constitution (its memorandum and articles of association) and must only exercise these powers for their proper purpose. If a director acts outside of their powers a company can still be bound by the unlawful actions of their Officers / Directors (unlike statutory

corporations, such as local authorities). Third parties acting in good faith can rely on decisions made by directors acting outside their authority, but the company may recover any resulting loss from the director personally.

3 Duty to act for the company and risk of local authority becoming a shadow director

- 3.1 Councillors and Officers appointed to external corporations must ensure that they take decisions in accordance with their personal convictions; **they must not act on behalf of, or in promotion of, the local authority**. As a director, the Councillor or Officer has a statutory duty to promote the success of the company and exercise independent judgement. If the Councillor is unable to do this without compromising their duty to the authority, they should resign their post. However, an Officer's duty to the authority is contractual, and so the authority can waive their contractual obligations if appropriate.
- 3.2 Furthermore, if the Councillor or Officer is a mere conduit for the local authority's viewpoint, the local authority risks being held to be a shadow director of the company. A shadow director is a person in accordance with whose directions or instructions the directors of a company are accustomed to act.
- 3.3 If the local authority is found to be a shadow director in an insolvency situation, it could be liable for the debts of the company where it knew, or ought to have concluded, that the company could not avoid insolvency but did not prevent it from continuing to trade (wrongful trading).

4 Requirement for appropriate level of skill and expertise

- 4.1 A director must exercise the care, skill and diligence which would be exercised by a reasonably diligent person with both:

- a) 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).
- b) The general knowledge, skill and experience that the director actually has (the "subjective" test).

4.2 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, they must meet the higher subjective standard. Therefore, a Councillor or Officer should consider, along with the appointing local authority, whether they have the skills necessary to run a company; it is not enough that an individual has the time and enthusiasm. In addition, individuals with specialist skills will be expected to apply those skills to their role as director.

Liabilities arising from insolvency of company or association

- 4.3 The need to have the necessary expertise to manage the company's finances is particularly important if the company is struggling financially. A director who does not scrutinise and understand the company's accounts risks incurring personal liability to the company's creditors for wrongful trading under section 214 or Section 246ZB of the Insolvency Act 1986 if they continue to trade when they knew, or ought to have concluded, that there was no reasonable prospect that the company would avoid becoming insolvent.
- 4.4 It is important to recognise that liability arises whether or not the director understood the company's financial position or intended any harm; if they should have known the company could not avoid insolvency, they were obliged to take every step to minimise its creditors' losses.

5 Avoid conflicts of interest – Council vs Company

- 5.1 A Councillor or Officer appointed as a director to a company will owe specific duties to the company in that capacity under both

statute and common law. Councillors and Officers are under a duty to exercise independent judgement when they are making decisions on behalf of the council. However, as a director of an external organisation they will also have a duty to exercise independent judgement and to act in the best interests of the company to which they are appointed.

- 5.2 This means that if the Councillor or Officer finds themselves in a situation where the interests of the council arise, the Councillor or Officer must disclose that interest. If they simply act or vote in line with the Council's position, the Councillor or Officer would not be acting in the best interests of the company and would be in breach of their duties as a director and could incur personal liability for their actions. Where a potential or actual conflict of interest arises, the Councillor or Officer may have to resign from either the company or the council.
- 5.3 A summary regarding potential conflicts of interest for Councillors who are members of Executive and/or the Shareholder Committee is set out in Annex 1 (Summary - Executive, Shareholder Committee and Companies) to this Appendix 1.

6 Other responsibilities

- 6.1 Directors must also be aware of how acts and decisions of other individuals may bind the company, for example:
- a) Company directors may have powers delegated to them by the company, but they also have ostensible authority to act on behalf of the company, and their actions will bind that company, so that a third party dealing in good faith with a company's director may rely on the actions of that director even if they were not actually authorised by the company.
 - b) Employers have vicarious liability for the tortious acts of employees carried out in the course of their employment. This can include discrimination against one employee at the hands of another, as well as breaches of health and safety.

Annex 1: Summary - Executive, Shareholder Committee and Companies

1 General

- 1.1 The shareholder of a company owned by the Council is always the City of York Council, not the members of the Executive or the Shareholder Committee themselves, or any Council Directors appointed to represent the Council on the boards of these companies.

2 Executive

2.1 Purpose in relation to companies:

- 2.1.1 The Executive will make decisions in relation to a company of which the Council is a Shareholder that are reserved to the Executive in the terms of reference of the Shareholder Committee as set out in the Constitution at Article 12: Shareholder Committee.

- 2.1.2 These are decisions that involve:

- a) changes to company governance e.g. including amending a company's articles of association, or its shareholder agreement;
- b) agreements to any amalgamation, merger, joint venture, profit sharing or similar arrangements; and
- c) approving steps to wind up a company.

2.2 Conflicts:

- 2.2.1 A member of the Executive can also be a director of a company. However, in the context of the Council being a shareholder of various companies and members of the

Executive also being Directors of various companies there is potential for conflicts to arise.

- 2.2.2 Councillors who have a direct or indirect disclosable pecuniary interest in any business at a meeting of the Council, e.g. award of a contract, must not participate in any discussion of the matter or vote on it, unless a dispensation has been obtained. Failure to comply with these requirements without reasonable excuse may result in prosecution.

3 Shareholder Committee

3.1 Purpose:

- 3.1.1 The Shareholder Committee has been established by the Executive specifically to discharge the shareholder functions of the Council in relation to those companies of which the Council is a shareholder. The Shareholder Committee does not have day-to-day operational control over any of the companies of which the Council is a shareholder.
- 3.1.2 The decisions which the Shareholder Committee is required to make in relation to a company are set out in the Shareholder Committee terms of reference as set out in the Constitution at Article 12: Shareholder Committee and the Shareholder Agreement for each company.

3.2 Conflicts:

- 3.2.1 In law, a shareholder of a company can also be a director of a company – this is often the case in small family-run companies. However, in the context of the Council being a shareholder of various companies and members of the Shareholder Committee also being Directors of various companies there is potential for conflicts to arise.
- 3.2.2 Councillors who have a direct or indirect disclosable pecuniary interest in any business at a meeting of the

Council, e.g. award of a contract, must not participate in any discussion of the matter or vote on it, unless a dispensation has been obtained. Failure to comply with these requirements without reasonable excuse may result in prosecution.

4 Director

4.1 Purpose:

4.1.1 A member who is appointed as a director of a company will be involved in all decisions regarding the day-to-day operation of that company. Directors owe a number of duties to their company which are set out in the Companies Act 2006:

- h) Act within powers
- i) Promote the success of the company
- j) Exercise independent judgement
- k) Exercise reasonable skill, care and diligence
- l) Avoid conflicts of interest
- m) Not accept benefits from third parties
- n) Declare interest in a proposed transaction or arrangement with the company

4.2 Conflicts:

4.2.1 Council decision making

Where a member of Shareholder Committee and/or the Executive is also a director of a company and the Shareholder Committee or the Executive is being asked to make a decision in relation to that company, e.g. award of a contract, the member should declare a direct or indirect disclosable pecuniary interest and must not participate in any discussion of the matter or vote on it, unless a dispensation has been obtained. Failure to comply with these

requirements without reasonable excuse may result in prosecution.

4.2.2 Company decision making

Conversely if the Councillor finds themselves in a situation in relation to the company where the interests of the Council arise, the Councillor must disclose that interest. The Councillor has a duty to exercise independent judgement and to act in the best interests of the company to which they are appointed. If they simply act or vote in line with the council's position, the Councillor would not be acting in the best interests of the company and would be in breach of their duties as a director and could incur personal liability for their actions.

5 Simple checklist:

If in doubt, consider the following questions:

1. Are you a member of the Executive and/or the Shareholder Committee?
2. Are you a director of the company in relation to which the Executive and/or Shareholder Committee is being asked to make a decision?

If the answer is 'yes' to both a potential conflict could arise and the member should declare this and not participate in any discussion of the matter or vote on it.

Appendix B – Duties and Responsibilities of a Trustee of Trust or Charitable Trust

Additional duties and responsibilities placed upon Trustees include making sure that the body acts in accordance with the overriding duty to all beneficiaries of the Trust. Beneficiaries may be people within the City of York or a specific category of persons for whose benefit the Trust was originally established. The Trustee Act 2000 contains most of the duties upon the Trustees; the Act also includes a statutory duty of care which applies when a Trustee is:

- Exercising a general power of investment or any specific power of investment arising from the Trust;
- Making investments arising in line with the Standard Investment Criteria under Section 4 of the Act or taking independent advice on investments under Section 5;
- Exercising the power to acquire land or deal in land;
- Appointing agents, custodians or nominees or in reviewing their obligations;
- Compounding liabilities under Section 15 of the Trustee Act 1925;
- Insuring Trust property;
- Dealing with reversionary interests, valuations or audits.

The standard of care expected of Trustees is that which is reasonable in the circumstances, taking into account any particular skills or competencies possessed by the individual, e.g. the standard of care will be higher for someone with an accounting qualification in relation to financial matters than someone without such a qualification.

Duties and responsibilities applicable to charities are even more extensive, as charitable Trustees have additional responsibilities under the Charities Acts. Information on this can be found on the Charity Commission website, or by using the attached link:

<https://www.gov.uk/guidance/charity-commission-guidance>.

In many cases the Charity Commission needs to be consulted before a charity takes action or decides on a particular course of action involving charity property.

Appendix C – Duties and Responsibilities of a Member of Unincorporated Association

Unincorporated associations and partnerships are not separate legal entities which means that the individuals who are represented on the management committee are personally liable for all acts and omissions of the body. Each of the individuals are jointly and individually liable for what the organisation does. Partnerships and voluntary organisations often have this legal status, however, such associations and partnerships should still have a written constitution setting out the procedural rules which need to be followed and governing how it operates.

An unincorporated association may be charitable and may register as a charity, if this is the case then the duties and responsibilities set out in Appendix B must be considered.

Appendix D – Duties and Responsibilities of a Member of Steering Group, Joint Committee or Partnership Body

The Council may establish joint arrangements with one or more local authorities and/or their Executives to exercise functions, which are not Executive functions in any of the participating authorities, or advise the Council. Such arrangements may involve the appointment of a joint committee with these other local authorities and a Councillor may be appointed to such a joint committee. A Member of the Executive may not be a Member of any joint committee established to carry out the Council's scrutiny functions.

The Council's Executive may establish joint arrangements with one or more local authorities to exercise functions which are Executive functions. Such arrangements may involve the appointment of joint committees with these other local authorities.

The council may delegate non-Executive functions to another local authority, or in certain circumstances, the Executive of another local authority. The decision whether or not to accept such a delegation from another local authority shall be reserved to the meeting of Full Council.

The Access to Information rules in Part 5A of the Local Government Act 1972 will apply to joint committees established under this Appendix.