



GUIDANCE FOR MEMBERS & OFFICERS WHO SERVE ON OUTSIDE BODIES

**A guide to the law for members and officers who are appointed
to represent Cambridgeshire County Council on another body**

September 2018

1. INTRODUCTION

- 1.1. The County Council appoints members and, less often, officers to serve on a wide range of organisations outside the council, including as directors of companies, trustees of charities, members of management committees and other roles on public bodies and voluntary organisations. These roles on outside bodies may give rise to occasional uncertainty about responsibilities and sometimes lead to conflicts of interest. For example, if an outside body comes into conflict with the Council and the member is a director or on the management committee of the outside body it is likely that the member's prime duty would be to the outside body in the conduct of the outside body's affairs.
- 1.2. The purpose of this guidance is to summarise the legal position and responsibilities of members and officers who are appointed by the council to serve on outside bodies. It is not intended to be an exhaustive explanation of the law and if further advice is required the Monitoring Officer should be contacted.
- 1.3. This guidance does not cover any situation where a member or officer who chooses to sit on an outside body in their own private capacity – in this case they should ensure there is no conflict of interest with their position as a member or officer.
- 1.4. Members and officers may be appointed by the Council to be an "observer" or to undertake a monitoring role at an outside body, facilitating exchanges of views or information as an extension of their 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, or simply to attend. In this type of role members and officers will be mainly concerned with representing the council and will not have responsibility for the governance of the body. Care should be taken to ensure such attendance is minuted/recorded each time to correctly reflect this.

2. GENERAL

- 2.1 Before accepting the directorship or trusteeship of an external organisation, the member or officer should consider how onerous the responsibilities are likely to be and should only accept the office if satisfied that they have the time and capacity to undertake them.
- 2.2 Consideration should also be given to whether there is likely to be any significant conflict of interest between the role as a director or trustee and their role as a member or officer. If such a conflict is likely to arise to a significant degree then the role should not be taken on.

2.3 The member or officer should also assess the risks of things going wrong which might raise the prospect of a personal liability. Matters to be taken into account include the nature of the functions of the outside body and the amount of money it holds or deals with. For example, some external companies handle considerable sums of money in the course of each year and have major functions. On the other hand, the risks associated with relatively small local charities are much less.

2.4 Members and officers who serve on outside bodies must exercise independent judgement in the interests of the organisation in which they are involved. Whilst it is recognised that they may have a commitment to representing the County Council on the outside organisation, they must also be aware that it is their responsibility to decide what view to take on any question before the organisation. Where a member or officer serves on the outside body in a representative capacity, this should be made clear to that body. There will be a fine line to tread between the duty to the outside body and to the County Council.

2.5 Ultimately the member or officer in acting as a Director or Trustee or member of a Management Committee of an outside body, must act in accordance with that body's interests, and not those of the Council or even the council tax payers at large. A mandate from the Council to vote one way or the other would put the member or officer in breach of the duty to the organisation. It is permissible to take account of the County Council's wishes, but not to vote simply in accordance with them. The overriding duty in considering an item before the outside body is to vote in accordance with the interests of that organisation.

2.6 A member or officer serving on an outside body must also ensure that avoidable loss is not incurred in managing that body. Individual responsibility cannot be avoided by not reading the papers or failing to ask for appropriate reports. Professional advice should also be sought where appropriate.

2.7 If there is a major dispute between the County Council and the outside body then the Council's representative can be placed in an untenable position. In these circumstances, the appointee should take advice from either the Chief Executive, the Monitoring Officer or the relevant Chief Officer.

2.8 At the end of the day, it is possible that a representative on an outside body may find themselves unable to adequately carry out their responsibilities properly, both as a member or officer of the County Council and as a Director/Trustee/Committee Member of the outside body. That would be an exception, and should not deflect those appointed to outside bodies from being prepared to participate in the management and running of outside organisations.

2.9 Finally, it is recommended that:-

- (a) Upon being appointed to an outside body, appointees obtain essential documents such as the outside body's governing document and the latest annual report and accounts
- (b) Clarify if there are any insurances or indemnities in place
- (c) Ensure the organisation has sound financial practices and procedures – take an interest in the business plan and other financial reports
- (d) Understand how decisions are made in the organisation including delegations of powers
- (e) Appointees to outside bodies should take advice from the s151 Officer or the Monitoring Officer (as appropriate) if they have any financial or other concerns about the body to which they have been appointed.

3. COMPANY DIRECTORS

3.1 The management of a company is generally the responsibility of a board of directors and the powers of the directors are usually set out in the company's Articles of Association (rules which govern the company's internal management). Directors are those who are appointed by the company to act in that capacity.

3.2 **Company Directors** have the following duties:-

- **A fiduciary duty** to the company (not individual shareholders) to act honestly and in good faith and in the best interests of the company as a whole. This means taking proper care of the assets of the company.
- **A general duty of care and skill** to the company. This means that Directors must exercise a degree of skill as may reasonably be expected from someone with that individual's particular knowledge and experience. However, Directors are not deemed to be experts, but are expected to use due diligence and to obtain expert advice if necessary.
- Directors must **exercise independent judgement**, although they may take account of the interests of any third party whom they represent. This may well require interests to be declared (see below). However Directors cannot vote simply in accordance with the Council's mandate.
- Directors are **not allowed to make a profit** from their position. They must therefore disclose any interests they or their family may have in relation to the company's contracts. Whether they are then allowed to vote will depend on the company's Articles of Association.

- Directors must **ensure compliance with the Companies Act** in relation to the keeping of accounts and making of returns to the Registrar of Companies and the information to be shown on stationery.
- There is a **duty to have regard to the interests of the company's employees**, particularly, for example, in respect of health and safety.
- Directors also have a range of **accounting and financial responsibilities**, including the preparation of accounts for each financial year, ensuring accounting records are maintained sufficiently to demonstrate the company's day to day transactions, approving the annual accounts and laying them before a general meeting and ensuring that annual accounts and reports are sent to shareholders and anyone else entitled to receive them.

3.3 Individual Directors can also be liable in certain circumstances, including the following:-

- A company can only act within the scope set out in its Memorandum of Association, and those Directors who knowingly cause the company to act beyond these activities will be liable personally.
- Directors may also be liable for breach of trust, if they misapply the money or property of the company. Directors may also be liable if they fail to take action to prevent the breach of a Co-Director of which they are aware.
- In the event of a failure to act in accordance with the best interests of the company, or if Directors use their powers improperly or make a personal profit from their position as a Director, then they may be personally liable for loss to the company and may be required to give to the company the personal profit made.
- If the level of skill and care shown by a Director falls below that which could reasonably be expected and the company suffers loss, the Director will be liable for the loss incurred. However, if it believes the Director acted honestly and reasonably, a Court may excuse the Director from this liability.
- If a Director knows or ought to know that there is no reasonable prospect of the company avoiding liquidation, the Court may require the Director to contribute to the company's assets on liquidation if the company continues to trade. This is known as wrongful trading. No such order will be made if the Court is satisfied that the Director took all reasonable steps to minimise the loss to the creditors.
- Directors will also be liable if to their knowledge the company carried on business with intent to defraud creditors or any other person, or for any other fraudulent purpose.
- Where a company fails to pay National Insurance contributions and this is due to fraud or neglect on the part of any director(s) of the company, they may be held personally responsible for the outstanding contributions.

3.4 Finally, information (apart from confidential information) must be given to other councillors about their activities as required by the local authority.

4. CHARITY TRUSTEES

4.1 Trustees of a charity are responsible for the control and administration of a charity and retain personal liability. Trustees must acquaint themselves with the terms of the Trust. In the case of a charity which is also a company, these terms will be found in the Memorandum and Articles of Association. Other Trusts will be found in the document under which the charity was established, such as a will or deed of gift or constitution.

4.2 **Charity Trustees** have the following duties:-

- Trustees must act in accordance with the terms of the Trust.
- The property of the charity must be used for the purposes for which the charity was set up. It must also be applied fairly between those properly entitled to benefit from it.
- Trustees have a duty to exercise such care and skill as is reasonable in the circumstances having particular regard to any special knowledge or experience that they have or holds themselves out as having. In addition, where a Trustee acts in the course of a business or profession, particular regard must be had to any special knowledge or experience which it is reasonable to expect of a person acting in the course of that kind of business or profession.
- Trustees must always act in the interests of the charity and of its beneficiaries or potential beneficiaries and without regard to their own private interests. This means that Charity Trustees must not put themselves in a position where their interests and duties conflict.
- The work must generally be unpaid. Trustees may be paid for their expenses from the charity's income and, very occasionally, the Charity Commission may allow wider remuneration where this is in the interests of the charity.
- Trustees cannot benefit either directly or indirectly from the charity.
- They must act reasonably and prudently in all matters relating to the charity and must always bear in mind the interests of the charity. They should manage the charity as carefully as if they were running their own business. Although they may delegate certain of their functions under the Trustee Act 2000 and also under any powers in the trust document, they remain legally responsible and must supervise and control the work of officers.
- Trustees must act in accordance with all relevant legislation.

- They have a duty to provide information to the Charity Commissioners. Most charities (except small ones with an annual income under £1000 a year) are required to register under the charities legislation. The Charity Commissioners rely on this information when making a decision about a charity, so it is very important that it is accurate. It is an offence to give the Charity Commissioners false or misleading information, or to alter, conceal or destroy charity documents which may be required by the Commissioners.
- All registered charities are subject to a number of accounting and reporting requirements, depending on their income and expenditure. These involve maintaining proper accounts, preparing the annual statement of accounts and an annual report and in some cases submitting them to the Charity Commission; and where the charity's gross income and total expenditure exceeds £10,000, making an annual report to the Charity Commission. Charity trustees are under a duty to ensure that these accounting and reporting requirements are carried out and to approve the annual report and accounts.
- The accounts of registered charities with a gross income or total expenditure exceeding £10,000 must, at the option of the trustees, be either audited or independently examined. In addition if either income or expenditure has been more than £250,000 in either of the previous two financial years then accounts must be audited by a registered auditor.
- Retaining accounting records and statements of account for at least 6 years.

5. MANAGEMENT COMMITTEES

5.1 Groups which are not charitable trusts or limited companies are "unincorporated associations" and have no separate legal identity from their members. The rules governing the members' duties and liabilities 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. An unincorporated organisation may be charitable and registerable as a charity.

5.2 Broadly, management committee members must act within the terms of the constitution, and must take reasonable care in exercising their powers.

5.3 Generally, members of management committees are liable for the acts of the organisation, but are entitled to an indemnity from the funds of the organisation if they have acted properly. If there are not enough funds, the committee members are personally liable for the shortfall. If one person is appointed by the constitution to act as the agent of the organisation for certain

purposes, then that person acts as the agent of all the members, who have joint liability for the agent's actions. Members of the management committee will have a personal liability if they act outside the authority given them or if they do not comply with the law.

5.4 Exceptions apply to certain consultative/advisory bodies such as EELGA & LGA where the representative will normally be expected to act in the Council's interests.

6. REGULATED COMPANIES

6.1 A company that is influenced by the Council (20% shareholding or more) or controlled by the Council (50% shareholding or more) will be a regulated company under the Local Authorities (Companies) Order 1995. This piece of legislation has a number of restrictions for members that sit on the board of regulated local authority companies, referring to them as "regulated directors".

6.2 These restrictions include:

- The maximum amount of remuneration is the greatest amount which would be payable by the Council in respect of a comparable duty performed on behalf of the Council, less any amount paid by the Council to the regulated director for duties to the Company;
- The maximum amount of travelling or subsistence allowance which would be payable to that director by the Council of which he is a member if the relevant duty were an approved duty for the purposes of s174 of the Local Government Act 1972
- When a regulated director becomes disqualified for membership of the Council, he/she must be removed as a director of the regulated company.

6.3 Where members sit on the board of an influenced or regulated company there will be an inherent conflict of interest in their roles as the Companies Act 2006 requires Directors to consider the best interests of the company and not the shareholders. However due to the restrictions on the remuneration and expenses of members in relation to such companies members are unlikely to have a disclosable pecuniary interest. Members should nonetheless declare their conflict of interest at Council meetings and avoid voting on or taking Council decisions in relation to such companies.

7. OTHER PUBLIC BODIES

7.1 There are bodies created by an Act of Parliament to carry out particular functions and whose constitution is set out in the legislation relating to that specific body. Examples include the Broads Authority, Internal Drainage Boards and school governing bodies.

7.2 The powers of the members of the body and duties and liabilities of those members individually and collectively depend upon the wording of the legislation in question. In general terms, however, the position of a member is similar to that of a councillor. It is therefore wise for a member of any of these bodies to obtain information for themselves from that body on its powers and duties, its Standing Orders and other procedures which they must follow and financial or other regulations which govern the conduct of its business.

7.3 In addition, conflicts of interest can occasionally arise for such appointees. In this respect, the general provisions described in Section 2 above will apply.

7.4 Finally, there is the developing area of partnerships and partnership boards. Generally, these are not legal entities in their own right and members are appointed purely to represent the County Council. In these circumstances the specific duties referred to above will not therefore tend to apply nor will there be a potential for a conflict of interest. On the other hand, the position may well be different if a separate legal entity is formed as part of the partnership working.

8. DECLARATION OF INTERESTS

8.1 If you have a **Disclosable Pecuniary Interest** in a matter to be considered at the meeting and that interest is on your Register of Interests you must not speak or vote on the matter. In many case (but not all) cases a Member will not have a Disclosable Pecuniary Interest (and therefore need not make any declaration)) if the matter relates to an outside body to which the County Council have appointed the Member as its representative.

8.2 Members do however need to pay particular attention to whether a body on which they have a beneficial interest (which includes a body corporate of which they are a director – NB. “director” includes being a member of the committee of management of an industrial and provident society) has or is likely to have a contractual relationship with the council (NB. which includes grant agreements). If this is the case then this is a specific disclosable pecuniary interest under the Localism Act 2011 as set out in the council’s code of conduct and it need to be declared as such and the member must not take part in any decision making.

8.3 If you do not have a Disclosable Pecuniary Interest you may nevertheless have a “**non-statutory disclosable interest**” in a matter to be discussed if it affects:

- your well-being or financial position
- that of your family or close friends
- that of a club or society in which you have a management role
- that of another public body of which you are a member to a greater extent than others in your ward.

If that is the case then you must declare such an interest but can speak and vote on the matter, **unless** the interest is “*one which a member of the public with knowledge of the relevant facts would reasonably regard as so significant that it is likely to prejudice your judgement of the public interest*” (s.10.2(b) of the council’s code of conduct sets out what action should be taken). Please seek the advice of the council’s Monitoring Officer if unsure about what needs to be declared in order to help avoid the appearance of bias.

8.4 When members discuss at Council meetings matters relating to an outside body on which they serve, they may take account of that outside body’s interest. However, they must not vote simply in accordance with the mandate of that outside body. In short, the primary consideration is the public interest.

8.5 Officers should have regard to the Officer’s Code of Conduct and discuss all potential conflicts of interest with their line manager, seeking advice from the council’s Monitoring Officer where appropriate. Written file notes should be made and kept of all advice given and action taken.

9. INDEMNITIES

9.1 An outside body can provide indemnities for its members as follows:

- a) Companies can now give their Directors indemnities. However, such indemnities cannot cover:-
 - (i) the Director’s liability to the company itself or to other companies within the same group;
 - (ii) fines imposed on a Director in criminal proceedings or in respect of a sum payable to a Regulatory Authority by way of penalty for non-compliance with any requirement of a regulatory nature; or

(iii) Liabilities incurred by a Director in defending criminal proceedings where convicted, or in defending any civil proceedings brought by the company, or an associated company in which judgement is made against such Director.

- (b) With regard to Charitable Trusts, an indemnity can be given from the Trust Fund provided the Trustee has acted properly and within their powers. Trustees may take out insurance to protect themselves against personal liability, but not for criminal acts, fraud etc. There will be no problem if the Trustees themselves pay the premiums but if they are paid out of the Charitable Funds the Trustees will need to consent to the Charity Commission unless the Trust Deed specifically allows it.
- (c) With regard to Management Committees, members will be entitled to an indemnity if they act in accordance with the Constitution and are not at fault. It is also possible to obtain insurance but if the organisation is to pay the premium it must be permitted by the Constitution.

10. RELATED ISSUES

- a) Occasionally, the County Council will be represented on outside bodies by third parties, rather than members or officers. This guidance applies in principle to these representatives, although some parts of it will necessarily not apply.
- b) From time to time, officers are, as a result of their position with the County Council, appointed to serve on an outside body by the body itself, rather than by the County Council. Examples include serving on the managing body of a professional association or appointment to a national body as a local authority representative. Again, most of the principles contained in this guidance will apply to that situation, depending on the nature of the outside body.
- c) Finally, officers may from time to time be asked to serve in their private capacity on outside bodies funded by the Council. This can often give rise to a conflict of interest for the officer, particularly in the situation where the officer is employed within the funding department. In these circumstances, the County Council takes the view that there will be circumstances where an officer should not serve on the outside body because of the potential for a conflict of interest.

11. FURTHER INFORMATION

If you require any further information about the issues raised in this Guidance Note please contact the Council's Monitoring Officer.

