

GUIDANCE TO COUNCILLORS ON OUTSIDE BODIES

Introduction:

This guidance is solely intended for the purpose of providing general advice on the duties, obligations and liabilities that you, as a Councillor will have if you are appointed to (or are on) an outside body.

Councillors may be appointed to varying organisations with differing roles. In some instances, Councillors will be bringing their experience, knowledge and expertise flowing from their appointment as a Councillor and in other instances the appointment will be distinct from your Councillor appointment.

The role of Councillors on outside bodies will depend on the nature of the outside body and the capacity in which you are appointed. The appointment may involve acting as a company director, the trustee of a charity or member of an unincorporated body. Each structure and appointment will hold differing levels of responsibility and liability.

In participating in outside bodies, Councillors *may* be expected to not only represent the interests of the Council but will have duties and responsibilities to the outside bodies. However, if the Councillor has been appointed into a decision-making role on the outside body, then they must act in the interests of that body and exercise independent judgment in making decisions in accordance with their duty of care to the body.

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 adhere to the NHDC Code of Conduct ('NHDC Code');
- Take an active and informed role in the affairs of the outside body.
- Note that Councillors are not on an outside body to represent their political party.

Conflicts of interests can often arise when Councillors are appointed to outside bodies and the Councillor is expected to manage these in accordance with this guidance.

This guidance cannot provide a detailed answer for all circumstances and consequently further advice and guidance should be sought from the Council's Monitoring Officer or Deputy Monitoring Officer if required.

1. Types of Organisation:

Councillors may participate in a variety of external organisations either independently or as a representative of the Council.

Some of the most common examples of outside bodies are:

- Companies limited by guarantee/shares
- Charitable Trusts
- Unincorporated association (like a Panel, or Board)

1.1 Companies Limited by Guarantee or Share

Companies have separate legal identities.

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.

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Directors of companies have a duty to the company to act in good faith to promote the success of the company. If they do not uphold this duty, they can incur personal liability, particularly if the company becomes insolvent.

1.2 **Charities**

A charity is an organisation which is established for charitable purposes only and is 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 and are regulated by the Charity Commissioners, to ensure that they are properly managed and are spending their money properly on the charitable objects.

1.3 **Unincorporated Associations**

Groups, which are neither limited companies nor charitable trusts, may be “unincorporated associations” which have no separate identity from their members.

2. **Types of Roles:**

When representing the Council on an outside body, Councillors are expected to:

- act in accordance with the constitution and framework set by the outside body;
- make independent and personal judgements in line with their duty of care to the outside body;
- behave ethically and comply with the Council's Code of Conduct for Members (Councillors) or except and insofar as it conflicts with any other lawful obligations to which that outside body may be subject;
- comply with any Code of Conduct or similar arrangements in place relating to the outside body
- take an active and informed role in the management of the outside body's affairs.
- be aware of any potential conflicts of interest that may arise as a result of the appointment and act/seek advice accordingly

There are several different types of roles that a Councillor may be appointed to take up, the most common ones are set out below with some general details of the responsibilities that they each hold:

- Director;
- Trustee;
- Representative/ member
- Observer

3. **Duties of a Director:**

Directors are effectively agents of the company and therefore owe a number of common law and equitable duties to the company. These duties are set out in the Companies Act 2006 and apply to both Executive and Non-Executive Directors

Directors must:

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- Act within their powers
- Promote the success of the company
- Exercise independent judgement
- Exercise reasonable skill, care and diligence
- Avoid conflicts of interest
- Not accept personal benefits from third parties
- Declare a personal interest in a proposed transaction/arrangement with the company.

3.1 Directors Liability

A Directors fiduciary and general duties are owed to the company therefore third parties will not normally have a cause of action against the Director, unless they act in a way which creates a personal obligation.

Some of the more serious wrongdoings that can expose a Director to personal liability are set out below: -

- Wrongful trading – trading at a time when a company has no reasonable prospect of avoiding insolvent liquidation which can result in personal liability for the debts
- Fraudulent trading - knowingly to carry on the business of a company with intent to defraud creditors or potential creditors
- Exceeding authority
- Director personally guaranteeing performance
- Acting as a director whilst disqualified
- Failing to maintain company records

4. Duties of a Charitable Trustee

Those who are responsible for the control and administration of a charity are referred to as Trustees.

It is important to highlight that companies limited by guarantee often have Directors who may be referred to as Trustees, particularly in charitable contexts, the terms are not interchangeable: A company limited by guarantee is a legal structure and the Directors are legally responsible for the company's management. Their powers are defined in the company's articles of association, while Trusteeship is a specific fiduciary role.

In situations where an organisation is a charitable company, then a Trustee will also be bound to act in accordance with the principles above as well as those set out below. There is an overlap of Trustee duties and those of a Director.

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.

General duties of a Trustee 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 Trustees).
- To promote the charity's purposes
- Acting for the benefit of the public
- Undivided loyalty to the beneficiaries of the charity
- Act in good faith
- Act within the powers of the Charity
- Prudence

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- Acting collectively

In addition to the above, 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.

4.1 **Liability of Trustees**

A charitable trust is not a separate legal entity therefore personal liability may be incurred if a Trustee:

- Acts outside the scope of the trust deed
- Falls below the required standard of care
- Makes a personal profit from the trust assets

5. **Non-corporate/ unincorporated associations**

An unincorporated association is simply described as a group of two or more individuals who come together for a common purpose. They are not separate legal entities, meaning the members, not the association or organisation, are legally responsible for its actions and debts.

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.

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 governing documents and the committee Terms of Reference and must take reasonable care when exercising their powers.

5.1 **Liability of being a member of the non-corporate/un-incorporated associations:**

There is an increased risk from the absence of a "corporate veil" of unincorporated associations.

A Councillor may, as a member of the association, be personally liable for claims against the unincorporated organisation if it has insufficient assets to meet any legal responsibility or debts.

6. **Conflicts of Interest:**

Conflicts of interest may arise between the Council and an outside body.

Even though the Council and the outside body have the same overall aims and objectives Councillors cannot assume that their interests will always be the same.

Conflicts of interest may arise if:

- the council is selling, donating or leasing land to the company.
- the company and the council are negotiating a contract with each other.
- the company is seeking funding from the council.
- there is a dispute between the company and the council.

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- the company is tendering or negotiating to provide goods, services or works to the council.

Success of company/charity:

The Trustee/Director must consider what would **promote, the success of the company or the purpose of the charity** and have regard to the likely consequences of any decision in the long term.

If the Councillor believes they are unable to do this without compromising their role as a Councillor and the interests of the residents of the district then serious consideration should be given to resigning the post.

Duty to Avoid:

There is a legal duty for Directors to avoid conflicts of interest.

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. Whether the Councillor is allowed to participate in the latter case will depend on the company's governance documents.

Confidentiality:

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 the alignment with the duties to the Council and its residents.

Actions:

If Councillors are uncertain whether a conflict of interest exists they should seek advice from the Monitoring Officer as soon as possible and also:

- Notify the company's board of directors,
- Take no further part in the matter on behalf of the company
- Consider the impact of this interest on any decisions you may be involved in at the Council

7. **Relationship between Code of Conduct and the Appointment to the body**

This Guidance should be read in conjunction with the NHDC's Code of Conduct for Members ([Section 17](#) of the Constitution). Councillors will be expected to comply with any code for the outside body when sitting on an outside body.

Councillors should ensure that they comply fully with their obligations to disclose interests where they are sitting as Directors or Trustees.

If Councillors are appointed to (or on) outside bodies and *this is not deemed a Pecuniary Interest*, then under the NHDC's Code it is likely to be a Declarable Interest. Therefore, if a relevant item of business comes to the Council – serious consideration has to be given

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as to whether a Councillor can participate in that meeting and if unsure should seek advice *before* the meeting.

8. Immunity, Insurance and Indemnity:

- 8.1 Where a Councillors acts within the course of their duties and in good faith, they have statutory immunity against personal liability.

However statutory immunity **does not** apply where a Councillor acts on an outside body. In most circumstances, the corporate veil means that a company can fail, owing creditors large sums of money, **without** affecting the Directors. However, in certain circumstances, Directors are held responsible for a company's liabilities.

- 8.2 NHDC **may** therefore provide an indemnity where Councillors are acting on an outside body, provided that:

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

The indemnity afforded by NHDC is subject to limitations however in general terms it reflects the statutory immunity protection therefore when a Councillor is acting properly, within their powers and in good faith, the power to indemnify will usually apply.

Regardless of any immunity, indemnity or insurance, Councillors may still incur personal liability or have to defend themselves where allegations are made that:

- They acted outside the powers of the authority
- They acted in bad faith, fraudulently or out of malice
- Their actions constitute a criminal offence
- They made a defamatory statement

In cases where Councillors act 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 and it is the expectation of NHDC that the outside body should insure / and or agree to indemnify the Councillor.

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 monitoring.officer@north-herts.gov.uk