

WINCHESTER CITY COUNCIL

GUIDANCE REGARDING SERVING ON OUTSIDE BODIES

Introduction

- 1.1 There are a number of outside bodies with which Members may become involved, such as sports clubs, housing associations, community organisations, trusts, volunteer groups, companies, etc. In some cases, the Council appoints the Member to serve as its representative on the outside body. In other cases, the Member may have been appointed independently of any Council involvement.
- 1.2 The law lays down many requirements with which Members must comply. These may include duties to the Council, as well as duties to the outside body and its members.

These duties may include:-

- A duty to act in accordance with the rules, constitution and framework of the outside body
 - A duty to keep the Council and relevant committees informed as to the activities of the outside body
 - A duty to take a proper role in the affairs of the outside body, including taking decisions on behalf of the outside body.
- 1.3 In some cases, the interests of a Member (as a Councillor) on the one hand, and as a representative on the outside body, on the other, may conflict. The following pages outline the rules which apply to various types of organisations. Advice is given on what action should be taken to avoid conflicts of interest arising, and how such conflicts should be dealt with should they occur.

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 Councillor or officer. If such a conflict is likely to arise to a significant degree then the role should not be taken on.
- 2.3 Also, the member or officer should assess the risks of things going wrong which might raise the prospect of a personal liability. Matters to be taken into account are 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 (e.g. educational 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 City 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 City 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 City 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 City 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 Corporate Head of Resources, or the Monitoring 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 City 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) Appointees to outside bodies should take advice from the Corporate Head of Resources or the Monitoring Officer (as appropriate) if they have any financial or other concerns about the body to which they have been appointed.

3. **A GUIDE TO THE LAW FOR MEMBERS ON OUTSIDE BODIES**

3.1 This guide is intended to give a general overview on the law which affects Members who are involved in outside bodies, whether or not this involvement arises from an appointment by the Council. It is not possible to provide a comprehensive guide to all possible situations, but the Monitoring Officer or their staff will be able to provide further advice when necessary.

3.2 In this guide, the word “member” is used to cover members of companies, organisations, management committees, etc. In order to avoid confusion, the word “Councillor” is used for references to elected members of the City Council.

4. **TYPES OF OUTSIDE BODIES**

4.1 There are a number of types of outside bodies in which Councillors may become involved, either independently, or as a representative appointed by the Council. Some common examples are:-

- Charitable Trust
- Company limited by shares
- Company limited by guarantee
- Unincorporated association

The structure of each type, the management, and the rules which govern the organisation, vary. The following table shows how each type is set up and managed:-

	Governing Document	Management	Possible Councillor involvement	Common types of organisation
Charitable Trust	Trust Deed	Trustee meetings	Trustee	Playing field trusts
Company limited by guarantee	Memorandum and Articles	a) Board of Directors b) Meetings of members	Director	Charitable organisations, housing associations, community associations
Company limited by shares	Memorandum and Articles	a) Board of Directors b) Meetings of shareholders	Director	Commercial organisations (e.g. providing contractual services)
Unincorporated association	Constitution	Management Committee Members meeting	Management Committee member	Community associations

- 4.2 In carrying out their duties as a Trustee, Director, or Management Committee member, Councillors must take decisions without being influenced by the fact that they are a Councillor. **Their primary duty in acting as a representative making management decisions for the outside body is to make these decisions in the interests of the organisation.** Councillors should always ensure that their fellow directors/trustees are aware of the fact that they are Councillors.
- 4.3 Councillors may take account of the wishes of the Council when dealing with the affairs of the outside body, but this must always be subsevient to the duty to act in the best interest of the outside body. Accordingly, Councillors should not take decisions for the outside body simply on the basis of the Council's wishes; rather, they should properly consider all the relevant issues, including the Council's views, and take a reasoned decision in the best interests of the organisation.
- 4.4 Although Councillor representatives are not expected to be expert in all matters which may be put before them, they are under a duty to ensure that avoidable loss is not incurred in managing the organisation. Where necessary, they and their fellow directors/trustees should seek proper advice.

5. CHARITABLE TRUSTS

- 5.1 Many arrangements constitute a "trust" in law. They are often set up to deal with private family financial affairs, to secure the future of a person's children. By their nature, these are not generally charitable.
- 5.2 There are many trusts set up to benefit a wider group of people, and (depending on the purpose for which the trust is set up in the first place) these trusts may be charitable. Common instances are trusts set up to run buildings of facilities such as playing fields, etc., and it is these trusts which Councillors are most likely to be involved in.
- 5.3 Whether or not it is charitable, a trust is usually set up by an individual, or a group of people, giving property to named trustees, on certain specified conditions. The gift and conditions are usually set out in a document known as a Trust Deed.
- 5.4 The Trust Deed may also give the trustees, and others, certain powers, such as the appointment or replacement of trustees, or the investment of funds, etc. These powers could include the power on the part of the City Council to appoint trustees to act as the Council's representative.
- 5.5 This type of organisation may often arise where an individual gives land for the benefit of the community, such as a playing field. The land would be given to named trustees to hold for the benefit of the community, and the trustees would then administer the land in accordance with the terms set out in the Trust Deed.
- 5.6 As most of the trusts with which the Council is involved with are charitable, detailed advice on the duties of trustees is set out in the Section on Charities, below.

6. COMPANIES

6.1 Companies are often created, to make the administration of an organisation easier. Companies are separate legal entities, which can enter into contracts, and employ staff. They can also sue and be sued, and this *may* protect the members of the organisation from individual, personal liability. It should be noted, however, that in some cases, directors can still be personally liable, as detailed below.

6.2 There are several forms of company with which Councillors may be involved. The two most common forms are:-

- Companies Limited by Shares
- Companies Limited by Guarantee

Companies Limited By Shares

6.3 Details on companies limited by shares have been included in this guide for completeness, but Councillors are currently unlikely to be nominated to these in the course of City Council business. This type of company will have a share capital, and the company allocates the shares to its members (the shareholders). In the event that the company is wound up, each shareholder is liable to pay the amount equivalent to the nominal value of his or her shareholding. If therefore a shareholder holds 100 £1 shares in a company, they would have to pay £100 in the event of winding up, even though the value of the shares might be e.g. £5.50 on the open market.

In return for this, shareholders share the ownership of the company, and its profits. This is normally done by the company paying a dividend to its shareholders. The dividend is usually declared on the basis of an amount of money per share held. In this type of company, the day to day management of the company is usually vested in the directors. The members ultimately control the company by electing the directors, and deciding major issues at general meetings.

6.4 Most high street companies are companies limited by shares, paying dividends to their shareholders (members).

Companies Limited By Guarantee

6.5 Companies limited by guarantee also have members, who control the activities of the company in the same way (i.e. electing directors, and making decisions in general meetings). However, these companies do not normally seek to make a profit, and do not therefore pay dividends to their members. In the event of the company being wound up, the members guarantee to make a payment to the level of their guarantee (although this is usually a nominal sum, e.g. £1). This type of company is more commonly used for voluntary and public bodies, especially where charitable status is sought (a company limited by shares cannot normally fulfil the criteria for registration as a charity).

General Company Matters

- 6.6 Whether a company is limited by shares, or limited by guarantee, the company is controlled by reference to its “constitution”, which is contained in the memorandum and articles of association. These documents will set out the powers of the company, and the rules by which it is to be managed.
- 6.7 Any act carried out by the company that is outside the powers set out in the memorandum will be unlawful, and a director involved in such an act may be personally liable for any resulting losses.
- 6.8 The articles of association will usually provide for the business of the company to be decided by the members of the company, acting in general meeting. At such meetings, the members would elect a board of directors, who would then deal with the day to day management of the company. In some cases, the articles may provide for the Board to elect further directors, in certain specified circumstances.
- 6.9 In some situations, the Council nominates Councillors to act as “observers” on the Board of Directors of a company. Although such observers would not be classed as directors for most purposes, Councillors should be aware that if an observer’s involvement increases, to such an extent that it could be said that there is an active engagement in the management of the company, he or she may be deemed to be a “shadow director” which may entail liability for losses, etc.
- 6.10 Once elected to the Board, a director has a number of duties and liabilities, under general company law. The fact that a director is appointed to the board as a representative of the Council does not diminish these duties. The director will be an agent of the company, whose prime duties and liabilities are as follows:

Duties

- (1) 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 duty is akin to that owed by Councillors to the council tax payers of the district.
- (2) A general duty of to take reasonable care and skill in acting in the company’s affairs, including seeking professional advice where this is necessary.
- (3) A duty to exercise independent judgement when dealing with the company’s affairs, rather than blindly voting in accordance with a direction from another body represented by the director (such as the Council in the case of a director nominated by the Council). A director representing another body may take into account the views of that body, but cannot allow them to rule against the *company’s* best interests.

- (4) A duty to avoid conflicts of interest. The interests of the Council and the company may conflict, but the director's primary duty is to the company, not the organisation he or she is representing.
- (5) A duty not to make a private profit from their position. Directors must therefore disclose any interests they or their family may have in relation to the company's contracts, and only take further part in discussions to the extent which the governing articles permit.
- (6) A duty to ensure that the legislation contained in the Companies Acts is complied with, e.g. submission of accounts and returns, etc. Failure to do so can lead to disqualification as a director.

Liabilities

- (1) Personal liability where a company acts outside of its powers, and the director knowingly causes or permits the company to so act.
 - (2) Liability to members of the company for breach of trust, if they misapplies 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.
 - (3) Liability to the company for any losses sustained where a director abuses his position in some way, or fails to act in the best interests of the company.
 - (4) Liability for losses caused by a director who fails to exercise the requisite level of skill and care (and fails to seek appropriate advice).
 - (5) Liability to contribute towards to company's assets where a director knows or ought to know that there is no reasonable prospect of the company avoiding liquidation, but allows the company to continue to trade ("wrongful trading"). A director should alert their fellow directors and the company's auditors where they are concerned about the company's position, and seek advice as necessary.
 - (6) Liability for fraudulent trading, i.e. where a company deals with the intent of defrauding creditors or others. As well as a fine, a director may be disqualified from acting as a director in another company.
 - (7) Liability to a fine and/or making good losses, where cheques and other documents do not bear the name of the company.
 - (8) Liability to pay damages where the director deals with an individual or another company, who believes that the director is authorised to so act, when in fact he or she has no such power.
- 6.11 Companies of all types, (guarantee or shares) can purchase insurance for their directors against claims for negligence, breaches of trust, etc., (subject to the company's powers permitting this). Directors should ensure that such insurance is in place, and that the provision of insurance is within the powers

of the company. The Council's own insurance does not extend to providing cover for Councillors as directors or trustees, and any Councillor involved as a director in a company of any sort should check with the company to ensure that this insurance is in place.

Local Authority Companies

- 6.12 Legislation is in force, which seeks to restrict and control companies which have a connection with local authorities, either because of the level of interest owned by the Council, or because of the degree of business and involvement between the Council and the company. "Company" includes:-
- companies limited by shares;
 - companies limited by guarantee;
 - Industrial and Provident Societies (including therefore most Housing Associations)
- 6.13 There are three types of local authority companies which are affected by the legislation. These are controlled, influenced and minority companies.
- 6.14 In general terms, companies are "controlled" by a local authority where there are more than 50% local authority interests.
- 6.15 Companies are "influenced" companies " where there is at least 20% local authority interest plus a business relationship with the company accounting for over 50% of the company's turnover and/or the company was located on local authority land leased or sold for less than best consideration.
- 6.16 Regulated companies (i.e. companies which are either "controlled" or "influenced" companies), will be under the effective control of the local authority, and under the legislation, will be subject to the capital finance regime which applies to local authorities, as well as other special propriety controls.
- 6.17 Minority companies are companies where the Council's interest is less than 20%. This type of company is not treated as part of the local authority, and is able to act with more freedom (subject to the other provisions affecting companies in general).
- 6.18 For this reason, the Council usually ensures that any involvement it has in companies is kept below 20%, i.e. that less than 20% of voting rights/directors are associated with the Council. Councillors are requested to seek advice from the Monitoring Officer if they consider that this limit may be exceeded at any time.
- 6.19 A person is "associated" with the Council if they are a current member or officer of the Council, or of a regulated company under the Council's control, **or has been a member of the Council at any time within the preceding four years.**
- 6.20 Councillors who are directors of regulated companies to which they have been nominated by the Council are under the following obligations:-

- (a) to ensure that the remuneration they receive from the company should not exceed prescribed limits, and should be declared;
- (b) to give information to Councillors about their activities as required by the local authority (save for confidential information); and
- (c) to cease to be a director immediately upon disqualification as a Councillor.

6.21 The controls on entities associated with local authorities may be subject to change when regulations are made under the Local Government and Public Involvement in Health Act 2007. The details are not yet available.

7. UNINCORPORATED ASSOCIATIONS

7.1 The other form of grouping with which Councillors may become involved with is the “unincorporated association”. Unlike companies, unincorporated associations have no separate legal identity. They consist of a group of people who have come together for a common purpose, and agreed to work together under a common set of rules. These rules often take the form of a written constitution, which will set out in detail how the organisation is to operate. In joining the group, each member agrees to abide by the constitution.

7.2 Normally, the constitution will provide for the election by the members of a management committee, which will be responsible for the everyday running of the organisation. The constitution may also provide for members to have annual general meetings, to deal with business such as the accounts, appointment of the management committee, etc.

7.3 Depending on the purpose for which the association is formed, and the rules governing it, an association may be charitable and therefore required to register as a charity.

7.4 Because the association is not a separate legal entity, it cannot hold property in its own name. Any property which the club controls will therefore have to be vested in an individual, or individuals, who are usually called the trustees of the association. They will hold the asset, subject to the direction of the members, or (more usually) the management committee.

Duties

7.5 The members of the Management Committee, and the trustees appointed to hold any assets for the association, must act within the constitution, and must take reasonable care in exercising their powers.

Liabilities

7.6 The Management Committee members are liable for the acts or omissions 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.

As in the case of companies, it is possible (subject to the rules in the constitution) for insurance to be taken out, to cover trustees and members of the management committee for their liability. Because the Council cannot arrange this insurance, Councillors who are trustees or management committee members should satisfy themselves that the trust has adequate insurance cover in this respect.

Where members have acted outside their authority, they will be liable to the members, and any third party affected by their actions, for any losses sustained.

8. CHARITIES

8.1 Many outside bodies with which Councillors will be involved will be charities. The advantages of a body having charitable status include:-

- Tax advantages
- Public image
- Donations can be more forthcoming

8.2 A charitable organisation is one which is formed for one or more of the charitable purposes defined in the Charities Act 2006. These include :-

- the prevention or relief of poverty
- the advancement of education
- the advancement of religion
- the advancement of health or saving of lives
- the advancement of citizenship or community development
- the advancement of the arts, culture, heritage or science
- the advancement of amateur sport
- the advancement of human rights, conflict resolution, or reconciliation or the promotion of religious or racial harmony or equality and diversity
- the advancement of environmental protection or improvement
- the relief of those in need by reason of youth, age, ill-health, disability, financial hardship, or other disadvantage
- the advancement of animal welfare
- the promotion of the efficiency of the armed forces of the crown, or of the efficiency of the police, fire and rescue services or ambulance services

8.3 Whichever purpose the charity is formed for, it must operate for the public benefit and have exclusively charitable purposes. Political organisations, and bodies whose powers include trading (regardless of the scale or nature) cannot be charitable.

8.4 An organisation that falls within the definition of a charity must be registered with the Charity Commissioners. The Commissioners oversee the operations of all charities, and grant consent to various transactions involving charities, where the law requires this.

- 8.5 Because of the nature of sharing profits with shareholders, a company limited by shares cannot be a charity.
- 8.6 To register as a charity the organisation must submit its governing instrument (i.e. the Trust Deed (in the case of a trust) the Memorandum and Articles of Association (of a company limited by guarantee) or the constitution (unincorporated association) to the Charity Commissioners for approval. If they are satisfied that the organisation is charitable it will be registered as such.
- 8.7 The law relating to charities imposes a number of duties and liabilities on those controlling the organisation. They are normally referred to as “trustees” which will include the Directors (of a company limited by guarantee) and the management committee of an unincorporated association.

Trustees' Duties

- 8.8 Trustees have the following duties:-
- A duty to act in accordance with the Trust Deed and to protect the charity's assets
 - A duty to comply with the Charities Acts and other legislation affecting the charity
 - A duty not to make a private profit from their position.
 - A duty to act with the standard of care which an ordinary, prudent business person would show. Higher standards are required of professionals, and in relation to investment matters.
 - A duty to ensure that the information relating to the trust and trustees is registered with the Charity Commissioners and that annual accounts and returns are completed and sent.
 - (where charitable income exceeds £5,000) a duty to ensure that letters, adverts, cheques etc. bear a statement that the organisation is a registered charity.

Trustees' Liabilities

- 8.9 Trustees have the following liabilities:-
- A liability to make good any deficiency where trust property has been used for a trustee's own purposes, or for purposes not in accordance with the purposes of the trust.
 - Personal liability for losses or claims where a trustee has acted outside the scope of the trust deed

- Personal liability where the trustee has not shown the required standard of care
- 8.10 Unlike a limited company, a trust has no separate identity from the trustees. Trustees are therefore personally liable for losses on contracts or claims by third parties, although trustees are entitled to an indemnity from the trust assets, provided they act properly in incurring the liability.
- 8.11 For example, in the case of a trust set up to run a community transport scheme, the trustees will be liable personally for a claim from a pedestrian injured by one of the drivers, although the trust's insurance arrangements will indemnify the trustees against the claim.
- 8.12 Trustees remain personally liable once they retire (e.g. if they have entered into a contract on behalf of the trust) and should therefore seek an indemnity from their successors. If the charity is a company however the trustees for the time being will be responsible.
- 8.13 Trustees may be liable to fines if they do not comply with the duty to make returns etc.

Indemnities

- 8.14 An indemnity may be given from the trust fund provided the trustee has acted properly and within his/her 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 the consent of the Charity Commissioners unless the trust deed allows it.

9. INTERESTS

- 9.1 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. However, the effect of the Code of Conduct is that in most (but not necessarily 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.
- 9.2 If you do not have a Disclosable Pecuniary Interest you may nevertheless have another Interest or Non-Pecuniary 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.

- 9.3 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.