

ADVICE FOR COUNCILLORS APPOINTED TO REPRESENT THE COUNCIL ON OUTSIDE BODIES

There are a number of organisations which are independent from the Council, but have connections with its service areas or communities.

In order that the Council can maintain effective partnerships with a number of these outside bodies, the Council has a variety of nomination rights enabling its representatives (usually elected councillors) to sit on them.

This advice is intended to assist councillors with their roles and responsibilities when they are appointed to represent the Council on outside bodies.

What must I do?

- Although the Council makes the nomination/appointment, the nominated Councillor holds office according to the constitution of that outside body. The Councillor must abide by the governance, code or constitution of that outside body and must understand the responsibilities and obligations taken on.
- **The Councillor's duty whilst sitting on that outside body is to that outside body**, not to the Council:
 - The Councillor must **act in accordance with what he or she considers to be the best interests of that body**;
 - The Councillor must exercise independent judgment rather than simply voting in accordance with what is perceived as the Council's wishes, although the two may coincide;
 - The Councillor has a **duty of confidentiality to the outside body if confidential information is received**, even if it is relevant to the Council. The same would apply in reverse to the Council's own confidential information – a 'Chinese Wall' has to be kept.
- The nominated Councillor must take an active and informed role in the management of the outside body's affairs, using its resources responsibly and prudently, unless they are placed merely as an observer.
- The Councillor must act with reasonable care and skill, making use of their skills and experience and taking advice when necessary.
- **Conflicts of Interest must always be disclosed** at any meeting. Where it is impossible for a Councillor to act in good faith as a member of an outside body then the Councillor should take no further part in the particular matter. If the conflict is very significant, the Councillor may have to resign the position on the outside body to avoid ongoing conflicts.

Can I be personally liable for my actions on the outside body?

A Councillor appointed to an outside body needs to be aware of the duties and potential liabilities arising from the role they take on, whether on a limited company, charitable trust or unincorporated association, and they should pay particular attention to the risk of any personal liability.

Companies:

- In general, a nominee onto an outside body which is a registered company is **not personally liable** for the actions, debts or liabilities of the company itself – the company is.

There are some exceptions:

- In the event that a trading company's assets are insufficient for the payment of its debts and other liabilities and the expenses of the winding up ('balance sheet' insolvency), a **Director** of that company may be personally liable to contribute to the company's assets (for the benefit of creditors) if there has been:
 - **Fraudulent Trading:** This requires dishonesty on the part of the Director in carrying on with business with the intent of defrauding the company's creditors when he or she knows the company cannot avoid insolvency.
 - **Wrongful Trading:** imposes liability on an honest Director who acts negligently. The legal test requires that at some point before the company was wound up, the Director knew or ought to have known that there was no reasonable prospect that the company would avoid insolvent liquidation and from that point onwards did not take every step they ought to have taken to minimise the loss to the company's creditors.
- A Councillor can be held personally liable if they make a personal profit from their position as Director, and must disclose any interests they or their family have in contracts entered into by the company.
- If a Councillor fails to act in the best interests of the company, or if they fail to show the level of skill and care that could be reasonably expected of a Director and the company suffers loss as a result, then the Councillor could be held personally liable for the loss.
- The Local Authorities (Company) Order 1995 imposes additional obligations for Directors of certain "regulated" companies (companies which are controlled or influenced by Local Authorities*):
 - A Councillor appointed by a Council to be a director of a regulated company must declare any remuneration they receive from the company for their role as a Director, the amount they can be paid is limited to the amount they could expect to receive working for the local authority in a similar role;
 - The Councillor must cease to be a director immediately upon disqualification as a Councillor.

*"Influenced" means the local authority has at least 20% shareholder voting 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. "Controlled" means over 50% local authority shareholder voting interest in the company.

Charitable Trusts:

- Personal liability could be incurred by a Trustee of a charitable trust if that person:
 - Acts beyond the scope of the charity's trust deed;
 - Falls below the required standard of care;
 - Makes a personal profit from trust assets.

Unincorporated Associations (with or without charitable status):

- As the outside body is not a company therefore there is no single legal 'person' responsible for the debts of the association. Responsibility is shared between the persons 'running' the association – usually, Trustees or Management Committee Members – who will be personally liable to the association members if they cause a financial loss by acting improperly.
- In addition, Trustees/Management Committee Members will be personally liable to a third party if there are debts owed by the association which it cannot meet from its own funds.

What Indemnity is Available?

- As set out above, the risk is higher where the body is not incorporated, but is still low in practice. The Council **does not provide a blanket standing indemnity** for Councillors or Officers appointed to outside bodies.
- The Council cannot regulate how Councillors behave on outside bodies and will not normally accept responsibility for matters over which it has no control.
- However, **it may be possible to provide an ad hoc indemnity** to members who become personally liable where it is fair to do so.
- In most instances the nature of an outside body's activities are low risk and an indemnity ought not to be necessary. In the last 18 years at Worcestershire County Council this has only been necessary once.
- The outside body itself should have the appropriate indemnities and the Councillor appointed should ensure this is in place on taking up the position.

In all cases where there is the potential for major conflicts of interest between the Council and an outside body, or where there is a question regarding indemnity, the Councillor should speak to the Head of Legal and Democratic Services.

L&DS SPM/AMO Aug 2017