



Guidance for members involved in outside bodies

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Borough Solicitor's Office

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Introduction

1. This guidance is intended for councillors who are appointed or nominated to represent the Council on organisations outside the Council, for example as a company director, the trustee of a charity or a member on a management committee. This guidance does not covers every situation in which duties, responsibilities or liability may arise and if councillors have any specific queries about any role or position they hold then they should seek the advice of the Borough Solicitor.
2. The first part of the guidance provides general information about appointments to outside bodies, what such a role entails and how it can affect a member's participation in Council decisions.
3. The second part of the guidance explains the different types of body that a councillor might be appointed to, highlights some of the most important responsibilities and duties which arise from such an appointment and the situations in which a councillor might become personally liable for their actions.

Part One – General Guidance

Appointments to Outside Bodies

4. The Council is often asked to nominate councillors to take part in outside bodies and councillors themselves may have particular interests which lead to such involvement. The range of such activities is very wide and currently the Council appoints members to 46 different organisations. It may be as a company director on a local community centre or trustee of a local charity. It could also be as a member of a local housing association, as a school governor or as a member of the management committee of a local voluntary organisation.
5. Appointments to outside bodies are made by Full Council or the General Purposes Committee and most appointments are usually made at the annual 'Constitution' meeting in May when appointments to committees are also made. Members are expected to report back to the Council about their involvement with any outside bodies they are appointed to by completing an annual return briefly setting out the activities of the organisation over the preceding year.
6. Participation in partner and community organisations by members adds value for the organisation, the Council and the community. Involvement in the management and running of outside organisations can be a fulfilling and interesting role and a way of directly engaging with the local community. It is important though that in taking on such roles members appreciate the duties and responsibilities that arise from it, how they interact with their existing responsibilities to the Council and how to recognise and deal with any conflicts that arise.
7. When you are considering your involvement with any outside body you should satisfy yourself that you understand and are able and willing to take on the role expected of you. As a member of any outside body you will be expected to participate fully in that organisation and if your other commitments mean that you will regularly have to miss meetings of the organisation or that you have to withdraw from meetings because of conflicts of interest then neither you, the Council or the organisation will be benefitting from your appointment. If you neglect your responsibilities to that outside body it is even possible that you will incur a personal liability. So you should not allow

your name to be put forward unless you are satisfied that you can participate fully in that organisation.

8. Some appointments i.e. a company director or trustee will require you to always act in the best interests of the company or trust. In doing so you will have to exercise your own best judgement and you cannot just take instructions from the Council. This overriding duty may not sit comfortably with the other roles and responsibilities you have i.e. as a member of the Council and may lead to conflicts of interest.
9. You should consider whether your membership of that outside body will give rise to personal and prejudicial interests or create a conflict of interest which might preclude you from participating in meetings of the Council. This aspect is dealt with in more detail below but as you will often be most interested in participating on outside bodies active in areas of special interest to you being involved in such organisations may, on occasions, require you to withdraw from meetings where matters relating to the body are discussed.
10. Your specific responsibilities as a member of an outside body depend on the legal structure of that body and the second half of this guidance is a series of short guides setting out your role and responsibilities and potential areas of liability for each of the main types of organisations which the Council appoints members to.

What is a Members' Role on an Outside Body

11. In general a members' main role on an outside body is to serve the organisation and this may require you to act as:
 - an adviser to the organisation, using your experience and knowledge of the local area and the Council to benefit the organisation. For example pointing the organisation in the right direction for funding applications.
 - a link person between the organisation and the Council, in the sense that you may bring news from one body to the other and enhance the networking opportunities for the Council and the organisation concerned.
12. You should not use your involvement with an outside body to:

- Promote the Council's interests. Participation on the organisation by councillors will inevitably promote the profile of the Council and as a spin off this may promote the interests of the Council but this is not the primary reason or purpose for your appointment.
- Promote yourself or your own interests. In some cases to do this could result in you being liable for losses incurred by the organisation and could also be a breach of the Members' Code of Conduct.
- Act as the 'spokesperson' for the Council on the outside body. Unless you are specifically mandated to speak on behalf of the Council on an issue you should not give the appearance that you have the authority to speak on the Council's behalf.
- Secure benefits for the organisation such as grants or consents through your position as a member of the Council.

Personal and Prejudicial Interests

13. Councillors must remember that, when they are acting as the Council's representative on an outside body, they remain subject to the Council's Code of Conduct. If that outside body also has its own Code of Conduct then councillors must also comply with that.
14. A member must notify the Borough Solicitor of any appointment to an outside body by the Council within 28 days of being appointed so that it can be included in your Register of Personal Interests. You are required to do this even though your appointment was made by the Council and even though the Borough Solicitor may have been present at the meeting at which the appointment was made. This is a personal obligation on you. Please note that this requirement can also apply to some bodies to which you are appointed other than by the Council.
15. At a Council, Executive, Committee or Sub-committee meeting you will have a personal interest in any item where it 'relates to or is likely to affect' the body or bodies to which the Council has appointed or nominated you to. Personal interests can arise in other ways but this guidance concentrates on the situations in which interests arise for members who have been nominated or appointed to an outside

body by the Council. Where the personal interest arises because it 'relates to or is likely to affect' the body or bodies to which the Council has appointed or nominated you to then you are only required to declare that interest if and when you speak on the item of business. If you do not speak then you do not have to declare the interest. However, the declaration of a personal interest does not necessarily affect a member's ability to participate in the discussion or voting on the matter.

16. A member with a personal interest must then, whether the interest was declared or not, consider whether the interest is also a prejudicial one. A prejudicial 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 judgment of the public interest. Additionally an interest is only regarded as prejudicial if it affects the financial position of the outside body or relates to determining an approval, consent, licence, permission or registration of the outside body.
17. In general it is unlikely that your judgment of the public interest will be prejudiced solely due to your nomination or appointment to the outside body by the Council. However, each situation is different and a member should seek advice at the earliest opportunity if they are unsure. A councillor with a prejudicial interest must leave the meeting at the start of the item of business and must not vote on the matter. The member may remain in a meeting for the purpose of answering questions, giving evidence or making representations, provided the public are also allowed to attend the meeting for the same purposes. Once they have answered questions or given evidence or made representations they must then leave the room and take no part in the vote.

Predetermination, Bias and the Appearance of Bias

18. The role of a councillor on outside bodies may also give rise to situations which fall outside of the personal and prejudicial interests covered by the Code of Conduct but raise issues of predetermination, bias or apparent bias which can also require a member to withdraw from a meeting.

19. Issues of predetermination and bias can also arise where an outside body to which you have been appointed is affected by a Council decision. A member might not have a prejudicial interest according to the Code of Conduct but their participation in a decision that affects that body may still raise issues of bias and apparent bias because the test for bias is different to that for prejudicial interests. Bias arises where a fair minded and informed observer, having considered all the facts would conclude that there was a real possibility that the decision was biased. It is important to be aware that there does not need to be actual bias, an appearance of bias is sufficient to jeopardise the decision.

20. Predetermination can also invalidate a decision and might arise if you having strongly expressed, advocated for or been associated with a particular view on an issue prior to a meeting which would indicate that you had already closed your mind on the matter.

Part Two – Common Types of Outside Bodies

Companies

22. A limited company is one of the most common types of bodies with which the council might be involved. Some examples include Chalkhill Community Centre Ltd, Age Concern London Ltd and Brent Housing Partnership Ltd.
23. A company has a separate legal personality to its shareholders (also described as company members or subscribers) or employees. This means that the company can enter into contracts, make a profit and incur debt. One of the main advantages of acting through a limited company is that shareholders can claim the benefit of limited liability and will not generally be responsible for the debts of the company. Additionally the company would normally be liable for the actions of employees (including directors) rather than for the individual themselves.

Your role

24. You could potentially fulfil two roles within the company:
- Representative of the council in its capacity as a shareholder
 - Director
25. Although the council can be a shareholder of a company (commonly known as being a “member” of the company), it requires an individual representative to act on its behalf, for example to attend, speak and vote at shareholders and members’ meetings and report back to the council as to what has taken place. For example the Council may appoint 2 representatives as members of Fortunegate Community Housing Ltd. As a general principle, shareholders of companies can exercise their right to vote as they wish, so they can take account of their own (i.e. the council’s) interests to the exclusion of conflicting interests of other shareholders.
26. A number of Councillors are currently appointed as directors to companies such as Brent Housing Partnership Ltd, the Park Royal Partnership Ltd and Energy Solutions

(North West) London Ltd. The duties of a director are now set out in the Companies Act 2006¹. The duties include requirements to

- Act within the companies powers
- Promote the success of the company
- Exercise reasonable care, skill and diligence and to exercise independent judgment
- Avoid conflicts of interest
- Not to make a private profit from their position as a director without approval of the shareholders and not to accept benefits from third parties
- To declare an interest in a proposed transaction or arrangement with the company

Personal Liability

27. You are highly unlikely to be held personally liable when acting as a representative of the council in its capacity as shareholder.

28. However, if you are a director of the company and act in breach of any of the duties imposed on you as a director, you may be personally liable to reimburse to the company any profits which you make, or any losses which the company or its creditors incurred as a result (although this liability may be excused if you acted honestly and reasonably). Following the coming into force of the Companies Act 2006 it is easier for shareholders to bring actions against directors on behalf of the company.

29. It is lawful for companies to purchase insurance to protect its directors against claims of negligence, breach of duty, trust and default. The Council's expectation when it nominates or appoints members to be director of companies is that such insurance will be put in place but members should check these arrangements themselves.

Directors' Duties in the Event of Insolvency

30. The duties of directors of insolvent or foreseeably insolvent companies are greater than those of solvent ones and a director may become personally liable.

¹ From 1 October 2009 the Companies Act 2009 will be fully in force

- The interests of the creditors become paramount ahead of any duties to shareholders and
- If a director fails to take every step to minimise a company's losses once he/she becomes aware, or should have become aware, that the company had no reasonable prospect of avoiding insolvency, that is wrongful trading, and the director will then be personally liable to creditors for any additional losses which they suffer as a result.

Other Types of Companies

31. Community Interest Companies ("CICs") are a special type of limited company established by the Companies (Audit, Investigations and Community Enterprise) Act 2004 as an alternative vehicle for social enterprises wishing to operate as companies "for the benefit of the community". They have a limited ability to distribute profit to some of their members.
32. Local Authorities can also be involved in Local Authority Companies. These are "regulated" and "influenced" companies:
 - "Regulated companies" are so defined if they are controlled or influenced by the local authority.
 - "Influenced companies", under the effective control of the local authority, will be subject to capital finance regime and special propriety controls.
33. The duties and obligations on a member representing the Council on a Community Interest Company or a Local Authority Company are not materially different from those of an ordinary company.

Statutory Corporations

34. These are bodies which are set up under by statute. There is a wide range of such statutory corporations, including school governing bodies, universities, health authorities, trusts, and PCTs combined Police and Fire Authorities, and many

NDPBs. The members of the statutory corporation, such as the governors of a school, and how they are appointed is set out in the statute, as are the powers of the statutory corporation. That statute will also set out the responsibilities and liabilities of members of the corporation.

35. One example of a statutory corporation that the Council currently appoints a member to is the Central and North West London NHS Foundation Trust where one member is appointed by the Council to the Council of Members of the Trust.

Trusts

36. A trust is a body which holds property or rights which it exercises on behalf of others (beneficiaries) or for some other particular purpose. A trust is normally a collection of individuals, although a local authority can be a sole trustee, and a trust is not a legal entity in its own right and therefore acts through its trustees. A trust arises from and is governed by a document called a trust deed.
37. Some examples of trusts to which the Council currently appoints members to are the Wembley Educational Foundation and the Edward Harvist Trust.
38. Some voluntary sector organisations call themselves a 'trust' even though, technically, they are simply an unincorporated body. The duties and obligations set out below only apply to genuine trusts, the duties and responsibilities associated with unincorporated bodies are discussed later in this guidance note.

Trustee Duties

39. A trustee has the following duties:
- To operate within the terms and powers of the trust deed
 - To act in the best interests of the beneficiaries as a whole
 - Not to allow personal interests and trustee duties to conflict
 - Duty of care to act with such care and skill as is reasonable in the circumstances and, if acting as trustee in the course of a business or profession, bringing and applying such special knowledge and experience which it is reasonable to expect

that a person undertaking the role of trustee as part of a business will bring to the job

- Not to make a private profit

40. A trust may, but does not have to be, a charitable trust. There are additional duties that arise if any organisation is granted charitable status. Please refer to the next section on charities for a discussion on these duties and responsibilities.

Personal Liability

41. Your role as a trustee will be in a personal capacity and you must be aware of the risk of personal liability for agreements with or claims by third parties against you which could arise if you breach the duties set out above.

Charities

42. Where a body provides a public benefit and is directed to charitable objects, such as the relief of poverty or the promotion of amateur sport, it may apply for charitable status. This brings significant advantages in terms of exclusion from Corporation Tax, recovery of any shortfall on VAT and relief from Business Rates. A charitable organisation can have various different structures i.e. a trust, company or an unincorporated body but will only be eligible for charitable status if it is precluded from distributing any profit to its members. Some examples of the charitable organisations that the Council appoints members too are the London Accident Prevention Council and Willesden Consolidated Charities.

43. This section only refers to the duties that stem from the body's charitable status but there may be additional relevant duties to be aware of that arise from the structure of the charitable organisation i.e. a trust or a company.

Duties

44. You must ensure that;

- Charitable funds and assets are used reasonably and only in furtherance of the charity's objects

- The charity does not breach any of the requirements or rules set out in its governing document and that it remains true to the charitable purpose and objects set out there.
- The charity is and will remain solvent.
- The charity complies with charity law, and with the requirements of the Charity Commission as regulator including the preparation of reports on what it has achieved and the Annual Returns.

Personal Liability

45. Where you cause loss to the charity by failing to fulfil your duties to the charity, the Charity Commission may take action to require you to reimburse the charity for any loss which it has suffered as a result.
46. Unless the trust deed specifically prevents it section 73F of the Charities Act 1993 allows payment of indemnity insurance for trustees out of trust funds.

Industrial & Provident Society

47. Industrial and Provident Societies (IPS) are corporations registered under the Industrial & Provident Societies Act 1965 and fall under the jurisdiction and control of the Financial Services Authority. They share many similarities with a company in that they have a separate legal personality and the liability of the IPS members is limited. In contrast to a company, however, an IPS is controlled by the IPS members equally (one vote per IPS member) not in accordance with each member's shareholding.
48. Examples of IPS's that the Council currently appoints members to the management committees of the Stadium Housing Association Ltd and the Willow Housing Board.

Your role

49. A Committee of Management, comprising directors (also known as committee members) can be appointed to run the affairs of the IPS on the IPS members' behalf (similar to a board of directors at a company). So you could potentially fulfil two roles within an IPS:
- Representative of the council in its capacity as an IPS member

- Director

50. Although the council can be an IPS member, it requires an individual representative to act on its behalf, for example to attend, speak and vote at IPS members meetings and report back to the council as to what has taken place. As a general principle, IPS members can exercise their right to vote as they wish and so they can take account of their own (i.e. the council's) interests to the exclusion of the IPS's interests.

51. The duties of a director of an IPS include:

- To act within the body's powers
- To promote the success of the IPS
- To exercise reasonable care, skill and diligence and independent judgement
- The duty to avoid conflicts of interest
- Not to make a private profit or accept benefits from third parties
- To declare an interest in a proposed transaction or arrangement with the IPS

Directors' Duties in the Event of Insolvency

52. Like a company the duties of a director in respect of insolvent or foreseeably insolvent IPS increase and a director can be held personally liable.

- The interests of the creditors become paramount ahead of any duties to IPS members; and
- If a director fails to take every step to minimise a company's losses once he becomes aware, or should have become aware, that the company had no reasonable prospect of avoiding insolvency, that is wrongful trading, and the director will then be personally liable to creditors for any additional losses which they suffer as a result.

Personal Liability

53. You are highly unlikely to be held personally liable when acting as a representative of the council in its capacity as an IPS member.

54. However, if you are in breach of any of the duties imposed on you as a director, you may be personally liable to reimburse to the IPS for any profits made / losses incurred as a result (although this liability may be excused if you acted honestly and reasonably).

Unincorporated Associations

55. An unincorporated association (sometimes referred to as a club) is a group of persons who come together to pursue a common purpose. Examples include sport clubs, self-help groups and community associations and one such body where the Council appoints a member too is the Reserve Forces and Cadets Association for Greater London.
56. An unincorporated association is simply formed by an agreement between the association members through a membership agreement or rules of the club. There are no formal registration requirements but they are usually governed by a constitution setting out the associations rules.
57. An unincorporated association does not have a separate legal personality from the association's members. Property will have to be held by individuals belonging to the association. The liability of the association members is unlimited because the unincorporated association has no separate legal personality. An unincorporated association carries a much higher risk of personal liability than other legal structures as the liability of the members is unlimited and attaches to them personally (unlike a company).
58. The general law does not impose any duties on either an association member or a committee member of an unincorporated association in the same way as it does for a company director or a trustee.

Limited liability Partnerships

59. A Limited Liability Partnership (LLP) is a new form of business vehicle which is a hybrid of a company and a partnership; although in reality it is closer to a company. It is most commonly used by firms of solicitors and accountants as an alternative to being a company. The Council does not currently appoint any councillors to bodies that are Limited Liability Partnerships.

60. An LLP has corporate personality separate from the members of the LLP (similar to a company) which means that the LLP can contract, sue and be sued, borrow and give security for borrowing. An LLP also has limited liability which means that the liability of the LLP members is limited to the level of their investment in the LLP.

61. The Council can be a member of an LLP but it requires individual representation to act on its behalf, for example to attend, speak and vote at LLP members meetings and report back to the council as to what has taken place.

62. This Guide assumes that your involvement in the LLP will be as the representative of the council in its capacity as an LLP member.

Duties of members

63. An LLP member (i.e. the council) has a duty to:

- Exercise appropriate care and skill
- Behave honestly and not take inducements or secret profits
- Refrain from allowing conflicts of interest

64. Although there is a general principal that an LLP member's liability is limited to their investment in the LLP, the LLP member may become individually liable where there is an act or omission of a fraudulent or negligent nature. But as the duties and potential liabilities of LLP members are likely to apply to the council itself as a member it is very unlikely that you will be held personally liable when acting as representative of the council on an LLP.