

### **Part 5.8 - Protocol for Councillor Representation on Outside Bodies**

The Council will appoint Councillors to serve on outside bodies in accordance with Article 3.2 of the Constitution.

The Council has produced this protocol to ensure that Councillors and officers are aware of their obligations when representing the Council on outside bodies (Companies, Unincorporated Associations, Charities and other Public Authorities).

#### **General Principles**

Councillors who are appointed to outside bodies shall be prepared to regularly attend all meetings of bodies to which they are appointed or to send an agreed and empowered substitute in exceptional cases.

Councillors shall report back to the Council (either Council, the Executive Board or the Committee whichever made the appointment) on proceedings/decisions taken by the outside body, as appropriate and in all cases within a reasonable time of being requested to do so.

Councillors shall also report back to the Overview Committee within a reasonable time if requested to do so.

Councillors shall act in accordance with the Nolan Principles of Public Life enshrined in the Council Code of Conduct.

#### **Key Principles of the Protocol**

\* Councillors and officers will act according to the rules, constitutions and frameworks set by the relevant outside body and, where possible, with those of the Council.

\* Councillors and officers will make independent and personal judgements based on their duty of care to the outside body.

\* Councillors will report back on their involvement with the outside body, to the Council, as required.

\* Councillors will comply with their obligations as far as they are applicable pursuant to the Code of Conduct.

\* Councillors and officers will take an active and informed role in the management of the outside body's affairs.

\* Councillors and officers are under a duty to exercise independent judgement in the interests of the organisation in which they are involved. Whilst it is recognised that Councillors and officers may have a commitment to representing the Council on the outside body, they must be aware that it is their responsibility to decide on what view to take on any question before that organisation. For example, an instruction from the Council to vote one way or the other would put the Councillor or officer in breach of his/her duty to the organisation. It is permissible to take account of the Council's wishes, but not to vote simply in accordance with them without applying their own judgement to the question before them.

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\* Where a Councillor or officer is involved in an outside organisation as a representative of the Council, he/she must declare that fact to the organisation.

\* Councillors/Officers must also ensure that avoidable loss is not incurred in managing the organisation concerned. They cannot avoid this responsibility by not reading the papers or failing to ask for the appropriate report. Councillors should seek professional advice as appropriate.

\* Councillors and officers who represent the Council need to familiarise themselves with the duties they will assume and any potential liabilities they may face. It is essential that they are aware of how to deal with any conflicts of interest that may arise.

### **Duties when appointed as a Company Director.**

\*To act in good faith and in the best interests of the company when making decisions as a director. This means exercising your own, independent judgement on matters and whilst factors such as the views and wishes of the Council or, if you are a Councillor, your political group, may be taken into account, one should avoid slavishly following the council or party group line without considering all other relevant considerations. When making decisions about the company the law also requires you to consider the interests of employees as well as the interests of Councillors/shareholders. In certain cases you may find that the best interests of the company and the Council conflict. Guidance on conflicts of interest is included in this protocol.

\* To exercise reasonable care and skill when making decisions as a director. A director requires no greater skill than might reasonably be expected of someone of that individual's particular knowledge and experience. Directors are not deemed to be experts but they are expected to use due diligence and to obtain expert advice if necessary. This is very similar to the Councillor/Officer relationship in terms of decision making and the provision and consideration of professional advice.

\* A fiduciary duty to act honestly and in good faith and in the best interests of the company as a whole.

\* To act in accordance with the company's memorandum and articles of association, plus any other rules, regulations or bylaws that the company may operate pursuant to. Councillors/Officers should ensure that they have an up to date copy of these documents and are aware of their contents.

\* To inform the board of a company if you have any direct or indirect interest in a contract the company is considering, proposing or entering. This, for example, will include contracts between the company and the Council. These requirements are similar to those contained in the Code of Conduct governing the declaration of interests. In general terms, Councillors must notify the other directors before the company makes a decision on the matter concerned and the Councillor should not take part in any board discussions about the contract. However this does not apply to Directors of Public Sector Partnership Services Limited or trustees of Magna Vitae. In these circumstances Directors who are also Councillors can take part in company discussions and vote in respect of Council contracts.

\* Not to make a profit from their positions within the company. You must therefore declare any interests you have (or those of your family) in relation to the company's contracts. Permission to vote on a particular matter would depend on the Articles of Association.

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\* To comply with company law. Directors must ensure that the Companies Acts are complied with particularly in respect of the maintenance of accounts and the submission of statutory returns to the registrar of companies. Failure to do so incurs fines and persistent default can lead to disqualification as a director.

### **Liabilities once appointed as a Company Director.**

Councillors/Officers acting as company directors may be held personally responsible for the company's debts and liabilities if they:-

\* Engage in wrongful trading, i.e. if you knowingly permit the company to continue to trade or incur liabilities when you know or ought to have known that the company is unable to pay its debts. Accordingly, councillors/officers must ensure that they obtain regular information about the company's financial position. Advice on interpretation of financial information may be obtained from the company's chief financial officer or if appropriate the Council itself. If you feel the company is unable to pay its debts you should notify the other directors as soon as possible. You should also consider whether to resign as a director. The Monitoring Officer will be able to advise you and you should seek their advice as soon as possible.

\* Misuse company assets.

\* Fail to act in the best interests of the company or fail to act with the level of skill that could be reasonably expected of you, save and except where the Court is satisfied that you acted honestly and reasonably.

\* Exceed the scope of any delegated authority you may have from the company. This is very similar to your position as a Councillor/Officer. Acting outside of the Council's powers can result in legal challenge.

\* Failure to disclose a direct or indirect interest in a contract with the company could result in;- The imposition of a fine and/or the requirement to pay to the company any money you have received under the terms of the contract.

Should the number of Directors on a company fall to two, advice it will be prudent to inform the Monitoring Officer so that the Council can consider whether it is prudent for your involvement to continue.

### **Public Sector Partnerships Services Ltd/Magna Vitae**

Where the appointment is to act as a Company Director (e.g. in the case of Public Sector Partnership Services Ltd or Magna Vitae Leisure Trust) then the Councillor (and/or officer if applicable) must undertake such duties with due regard to Company Law. This means that their responsibility is to act and contribute to company decision making in the best interests of the Company (which may not necessarily coincide with the best interests of the Council). The duty to act in accordance with Company Law is a personal duty owed to the Company as a corporate body which is placed upon the Director.

### **The Principles of Charity Law**

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Charities may be created by registering any of the following with the Charity Commission:-

- (1) A Trust Deed – the Trustees become charity trustees.
- (2) A company limited by guarantee – the directors become charity trustees.
- (3) An unincorporated association – the Management Committee become charity trustees.

In order to qualify for a charitable status, the Charity Commission must be satisfied that the organisation is operating for a charitable purpose namely:- the relief of poverty and human suffering, the advancement of education or the advancement of religion.

### **The Duties of a Charity Trustee**

A Charity Trustee must:-

- \* Act strictly in accordance with the charity's constitution and rules.
- \* Act in the best interests of the charity.
- \* Manage the charity's affairs prudently.
- \* Not derive any personal benefit or gain from the charity.
- \* Take professional advice on matters you are not competent to decide yourself.
- \* Ensure that the charity's bank accounts are operated by more than one person.
- \* Ensure the trustees have proper control of the charity's property and assets.
- \* Ensure that the charity keeps full and accurate accounting records.
- \* Spend charity income solely for the purposes set out in the charity's Constitution. Ensure charity property is properly maintained and insured.

### **Personal Liability of a Charity Trustee**

Personal liability may be incurred if a trustee:- (1) acts outside the scope of the trust deed (2) falls below the required standard in respect of the duty of care owed by them (3) makes a personal profit from the trust assets or any transaction associated with the charitable trust.

### **Unincorporated Associations**

Bodies which are not charities, companies or public bodies are often referred to as unincorporated associations. They usually operate pursuant to a constitution or set of rules defining the organisation's responsibilities and those of its Councillors. The affairs of an unincorporated association are usually governed by a management committee in accordance with the organisation's constitution or agreed rules of procedure. Unincorporated associations cannot enter into contracts, own land, or employ staff. Councillors of the organisation's management committee must act in accordance with its Constitution and must take reasonable care in exercising the organisation's powers. Generally, Councillors of the Management Committee are personally liable for the acts of the organisation but are entitled to an indemnity from the funds of the organisation if they have acted reasonably and in good faith. If there are not enough funds, the Committee Councillors will

however be personally liable for the shortfall. Councillors of a Management Committee will have personal liability if they act outside the authority given to them or if they do not comply with the relevant legal obligations.

### **Duties of Management Committee Councillors of Unincorporated Associations**

- \* Councillors must act in the best interests of the association.
- \* Use reasonable care and skill when involved in decision making on behalf of the association.
- \* Act in accordance with the association's rules or Constitution.
- \* Councillors/officers are therefore encouraged to clarify the extent of any limits to their power to act on behalf of the Council.
- \* Promptly notify the Monitoring Officer if the association is proposing to take a course of action which is disadvantageous to the Council or which seems to involve considerable risk.
- \* Ensure the association has clear rules and procedures for decision making, particularly for entering into contracts and promptly notify the Monitoring Officer of any concerns in this regard.

### **Other Public Authorities**

Some Councillors will be appointed to other public authorities, for example Internal Drainage Boards. Like the Council, these bodies are created by statute and have a range of powers and duties. Councillors appointed to such Public Authorities will be required to comply with that Authority's code of conduct if one is in operation, when conducting business for them. In practice they are likely to be similar to the Council's own Code of Conduct. In cases of doubt, advice should be sought from the Monitoring Officer.

Councillors representing the Council on other bodies (such as a company, charity or unincorporated association), must comply with the Council's Code of Conduct except where it conflicts with any legal obligations the other body or organisation is bound by. Such conflicts are, in the view of the Monitoring Officer likely to be rare. In cases of doubt, advice should be sought from the Monitoring Officer.

### **Compliance with the Council's Code of Conduct**

Councillors are obliged to observe the provisions of the Code Conduct whenever they conduct the business of the authority including when they act as a representative of the authority, except and insofar as it conflicts with any other lawful obligations to which that body is subject. It isn't easy to imagine such circumstances arising, but one example might be where the Council was proposing to take action which would have an extremely adverse effect on the financial wellbeing of a company on which a member held a Directorship. If the Councillor was privy to the information concerning the authority's plans he may find himself in a position where he was compelled to disclose this potentially confidential information to the company due to his fiduciary duty to the company itself and duties arising under the Companies Acts to avoid trading when insolvent. This is an extreme example but one which could feasibly arise. In such circumstances, acting contrary to the Council

Code of Conduct would not be taken as a breach, because of the wider duties that apply to the Company.

### **Declaration of Interests**

A Councillor must regard themselves as having a personal interest in any business before the Council, if the matter relates to an interest in an outside body with which they are involved. This means that where a Councillor is appointed to an outside body, they must declare it before (or at the time) the item is raised. Where a Councillor has a personal interest in a matter they must also give consideration as to whether they should withdraw from debate/voting on the matter. The legal test applied for this is an objective one of whether a member of the public with full knowledge of the circumstances would reasonably regard the interest as so significant that it is likely to prejudice the member's judgement of the public interest. Advice of the Monitoring Officer should be sought in particular cases and councillors should always remember that perception is an important aspect of the ethical principles outlined in the Council Code of Conduct.

### **Conflicts of interest**

Conflicts of interest may arise between the Council and a company to which you are appointed as a Director. Even if the Council and the company have the same overall aims and objectives, you cannot assume that their interests will always be the same. The legal position and your obligations, remain the same, namely that you have a fiduciary duty to the company as a matter of company law.

Conflicts of interest may arise If for instance the council is disposing of land to the company, if the company and the Council are negotiating a contract with each other, if the company is seeking funding from the Council, if there is a dispute between the company and the council or if the company is tendering or negotiating to provide goods, services or works to the Council.

Company law requires you to act in the best interests of the company but the Council will have nominated you as a director to represent or promote the Council's interests. Accordingly, if you are uncertain whether a conflict of interest exists you should seek advice from the Monitoring Officer in any particular case.

If you think you have a conflict of interest you should take the following steps:-

- Notify the Monitoring Officer
- Notify the company's Board of Directors
- Take no further part in the matter on behalf of the company.
- You should take no part in the matter on behalf of the Council either. This includes not taking part in any discussions on the matter or representing the council at meetings where the matter is discussed. You should declare an interest and leave the room whenever the matter is raised.